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Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 94-43

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Kenosha and
Racine, Wisconsin,
in the Milwaukee, Wisconsin
Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: May 5, 1994; Released: May 16, 1994

Comment Date: July 7, 1994
Reply Comment Date: July 22, 1994

By the Chief, Cable Services Bureau:

1. Before the Commission is a petition for rule making filed by LeSEA Broadcasting Corporation, the licensee of television station WHKE(TV), Channel 55 (Independent), Kenosha, Wisconsin, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to add the communities of Kenosha and Racine, Wisconsin, to the Milwaukee, Wisconsin television market. *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).[1]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. 76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[2]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[3] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. According to the petitioner, Milwaukee, Racine and Kenosha are located in close proximity, with Racine approximately 24 miles south of Milwaukee and Kenosha some 10 miles south of Racine. It notes that each city is a major population center in its own right, each a separate Primary Metropolitan Statistical Area (PMSA) as designated by the United States Office of Management and Budget.[4] In addition, the petitioner states that Kenosha and Racine are included in both the Milwaukee Survey Area and the "Milwaukee (Kenosha & Racine)" Area of Dominant Influence (ADI) as defined by Arbitron. The petitioner states that the coverage areas of both WHKE and television station WJJA(TV), Channel 49 (Independent), Racine, Wisconsin, licensed to TV-49, Inc., overlap significantly the coverage areas of the seven television stations licensed to Milwaukee. These facts, according to the petitioner, reflect both the commonality of the communities proposed to be added to the market designation and the

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[1] The Commission has delegated authority to the staff to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See* Section 0.321 of the Commission's Rules. *See also Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.150 (1993).

[2] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[3] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] The petitioner states that these three contiguous PMSAs, located in the southwest corner of Wisconsin, abut the Chicago, Illinois, Metropolitan Statistical Area to the south.

market as a whole, and that WKHE competes for audiences and revenue in a common television market with the stations licensed to Milwaukee and Racine.

6. The petitioner further states that although WHKE is unavoidably competitive with the other market-area stations, amendment of the Commission's Rules as proposed is essential to reflect market realities and to equalize competition among the stations. Specifically, the petitioner states that while WHKE is entitled to carriage on Milwaukee and Racine-area cable systems by virtue of its inclusion in the Milwaukee ADI,[5] because Kenosha and Racine are not designated communities in the Section 76.51 market listings, the station would be considered a "distant signal" for purposes of compulsory copyright license liability if carried on certain cable systems in the ADI.[6] As a result, the petitioner states, it has already received notifications by several ADI area cable systems that they will not carry the station due to increased copyright liability attendant to the carriage of a "distant signal."[7]

7. Inasmuch as market hyphenations "are based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities," the petitioner states that it meets all the criteria for the requested amendment of Section 76.51. In addition to the proximity of the subject communities and the competitive nature of the market, the petitioner asserts that any concern that cable carriage might be provided in areas beyond WHKE's Grade B signal contour "would no longer seem to have relevance" under the Commission's ADI-based must-carry rules. Nevertheless, it contends that the majority of the Milwaukee-area cable systems which would be affected by the rule change are within the Grade B contours of the Racine or Kenosha stations. The petitioner also states that its particularized need for the requested rule change is demonstrated by the fact that WKHE faces real and immediate concerns that the station will not be carried on area cable systems because of potential copyright liability. Finally, it maintains that the public will benefit from the proposed redesignation because it will bring diversified programming from a local independent UHF station to Milwaukee-area cable viewers.

DISCUSSION

8. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that the television stations licensed to Milwaukee, Kenosha and Racine do compete for audiences and advertisers throughout much, if not most, of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed communities to be added to a market designation and the market as a whole. Moreover, the petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

9. The Commission has stated that it will not restrict the types of evidence parties may submit to demonstrate the propriety of a market adjustment because each case will be unique to the individual factual situation presented.[8] The petitioner here has alleged that the proximity of the subject communities and the similarity of Grade B signal contours demonstrate the appropriateness of the requested action.[9] Indeed, from the information attached to the petition, it appears that the stations licensed to Milwaukee place a Grade B or better signal over the communities of Kenosha and Racine; that WJJA provides Grade B or better service to Milwaukee and Kenosha; and that the signals of WJJA and WHKE are subsumed significantly within those of the Milwaukee stations. Accordingly, we believe that the initiation of a rule making proceeding is warranted. Proponents of the change requested, however, should be aware that the standard of proof to change the rules is higher than the standard to simply initiate a rule making proceeding. In this regard, while WHKE appears to provide Grade B service to Racine, it is not clear if, or to what degree such service is provided to Milwaukee, the core city of this market. Under these circumstances, then, it may be helpful to receive additional comment on the competition between WHKE and other stations in the subject market for viewers, programming[10] and advertising revenue, as well as how other media view the market.[11]

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[5] (*See* Section 76.56(b) of the Commission's Rules.

[6] Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Kenosha as a designated community in this market list generally results in WKHE's classification as a "distant signal" for market-area cable systems more than 35 miles from Kenosha. By amending Section 76.51 of the Rules to include the communities of Kenosha and Racine as proposed, the petitioner asserts that market-area cable systems will be able to carry WHKE on an equal basis with those stations in the market without incurring distant signal liability.

[7] (Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, *supra*, at 2973-74.

[8] *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2977.

[9] The petitioner's assertions as to its particularized need for the requested action, *i.e.*, the effect of the copyright compulsory license, is a factor present in virtually all cases of this type. Of itself, however, this factor is not determinative of the appropriateness of a proposed market adjustment. Rather, it is but one of the many types of evidence the Commission may consider in evaluating the competitive nature of a particular television market.

[10] *See, e.g., Notice of Proposed Rule Making* in MM Docket No. 93-290 (Newton, N.J./Riverhead, N.Y.), 8 FCC Rcd 8136, 8137, ¶ 7 (1993). Moreover, the extent of this petitioner's copyright liability; whether such liability actually threatens the viability of the station; or whether the station might qualify as a "specialty station" or "significantly viewed signal" for copyright purposes such that any potential liability might be "alleviated are not clear. *See Policy Decision Concerning Cable Compulsory License Specialty Station and Significantly Viewed Signal Determinations*, 54 FR 38461 (1989).

[11] *See, e.g., Notice of Proposed Rule Making* in MM Docket 93-291 (Lawrence, Mass.), 8 FCC Rcd 8171, 8172 (1993).

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

10. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

11. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 7, 1994**, and reply comments on or before **July 22, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

13. For additional information on this proceeding, contact Alan E. Aronowitz, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 94-42

In the Matter of

Amendment of Section 76.51 of the
Commission's Rules to Include
Decatur, Texas, in the Dallas-Fort
Worth, Texas, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: May 5, 1994; Released: May 16, 1994

Comment Date: July 7, 1994
Reply Comment Date: July 22, 1994

By the Chief, Cable Services Bureau:

1. Before the Commission is a petition for rule making filed by Word of God Fellowship, Inc. ("WOGFI"), permittee of KMPX-TV (Channel 29, Independent), Decatur, Texas, seeking to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Dallas-Fort Worth television market to include the community of Decatur, Texas. *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2978 n.150 (1993).[1]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one named community (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any ofthe named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area, yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[2]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[3] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. In support of its request, WOGFI states that there is "ample commonality between Decatur and the Dallas-Ft. Worth market."[4] It asserts that Decatur is in the Dallas-Ft. Worth Area of Dominant Influence ("ADI"), as determined by Arbitron. Furthermore, it states that Wise County, in which Decatur is situated, is one of the 33 counties in the ADI, and is also one of the 11 counties in the Metro Survey Area and the U.S. Census Bureau's Metropolitan Statistical Area. Moreover, WOGFI claims that Dallas-Ft. Worth stations have "significantly viewed" status[5] in Wise County and that there are common cultural, social and economic interests between the residents of these areas. Also, it states that the distance from Decatur to Ft. Worth is 36 miles coordinate-to-coordinate, and 28 miles computed by city limit-to-city limit. The comparable figures for Decatur to Dallas are 52 and 39 miles, respectively. The petitioner further notes that KMPX's tower is located within the Dallas city limits and that the station places a city

[1] The Commission has delegated authority to the staff to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See* Section 0.321 of the Commission's Rules. *See also Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.150 (1993).

[2] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See also Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[3] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] Petition at 3.

[5] *See* Section 76.54 of the Commission's Rules.

grade signal contour over both Dallas and Ft. Worth, which, it asserts, surpasses the "Grade B criteria which the Commission considers as determinative."[6]

6. WOGFI contends that it requires the sought relief so that cable systems in the vicinity of Dallas and Ft. Worth "will have an opportunity to carry KMPX without concern for adverse financial implications because of copyright obligations."[7] It also states that because of non-duplication protection and the Commission's syndicated exclusivity rule, it cannot purchase programs for just Decatur. In this regard, the petitioner states that, because it places more than a Grade B signal over Dallas and Ft. Worth, syndicators will only sell it programs that have not been purchased by Dallas or Ft. Worth stations or, where they will sell WOGFI the programs, will only do so at Dallas-Ft. Worth prices. The petitioner alleges that it cannot both pay Dallas-Ft. Worth prices for programming *and* afford to indemnify cable systems for the added copyright fees that its carriage as a distant signal would trigger.[8] Absent the requested relief, WOGFI maintains, it will be unable to compete in the Dallas-Ft. Worth market and will not be a viable television service. This would, it continues, deprive Decatur of its first local television service and a vehicle of local expression.

DISCUSSION

7. Based on the facts presented, we believe that a sufficient, albeit minimal, case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that KMPX provides city-grade signal coverage to Dallas and Ft. Worth such that the station is likely to compete for audience and advertising in the proposed combined market area. Moreover, the petitioner's proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

8. The Commission has stated that it will not restrict the types of evidence parties may submit to demonstrate the propriety of a proposed market adjustment because each case will be unique to the individual factual situation presented.[9] The petitioner here has alleged that the proximity of the subject communities and KMPX's signal coverage to Dallas and Ft. Worth demonstrate the appropriateness of the requested action. However, the distance between Decatur and Dallas or Ft. Worth is not, of itself, determinative of the requisite showing of commonality among these communities. Moreover, the petitioner has submitted no information concerning other television services in the ADI and signal coverage areas that would indicate if, and to what extent, area stations may be competitive.[10] We have previously held that "|m|arket hyphenation helps equalize competition' where, due to population, geographic, or other factors, some stations licensed to different communities beyond the Grade B contours of those stations in a given television market compete for economic support." *TV 14, Inc. (Rome, GA), supra* at 8592. WOGFI has provided no information on any station's Grade B contour other than its own.

9. WOGFI has also shown that it covers Dallas and Ft. Worth with a city-grade signal contour due to the placement of its antenna in Dallas as a result of the Commission's grant of its request for a modification of the KMPX construction permit.[11] This modification has enabled KMPX to provide the city-grade service to Dallas and Ft. Worth, which the petitioner now cites in support for uniting Decatur with the Dallas-Ft. Worth market. However, it has not been demonstrated, nor is it apparent, that a Decatur station would place such a signal contour over the Dallas-Ft. Worth market without placing its antenna in Dallas or, conversely, that Decatur receives Grade B coverage from any area station, so as to suggest that, in actuality, the communities are part of a single market.[12] Nor has the petitioner provided any evidence of social, economic or cultural commonality between Decatur and the rest of the Dallas-Ft. Worth market,[13] or how other media view the market.[14] In other words, while WOGFI can demonstrate a commonality of areas served by Dallas-Ft. Worth stations and KMPX, whose signal contours overlap, it has not demonstrated in its petition that sufficient commonality exists between Decatur and the other communities that comprise the market.

10. To the extent that the petitioner argues that amendment of Section 76.51 will permit cable systems near Dallas and Ft. Worth to carry KMPX without WOGFI having to indemnify such systems for increased copyright liability, it has failed to provide any specific examples of KMPX being denied carriage or the petitioner being asked to indemnify any cable system because the station might be a distant

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[6] Petition at 4.

[7] Petition at 2.

[8] Petition at 5.

[9] *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2977. Similarly, while the factors set forth in paragraph 3, *supra*, are among those the Commission will evaluate in proposed hyphenation cases, they are by no means, individually or collectively, determinative in every case.

[10] *See, e.g., Notice of Proposed Rule Making* in MM Docket No. 93-260 (Marion, IN), 8 FCC Rcd 7273 (1993).

[11] *See Decatur Telecasting, Inc.*, 7 FCC Rcd 8622 (1992). In that decision, the Commission, *inter alia*, allowed the specification of an antenna site in Dallas upon a showing that, utilizing the NBS Tech Note 101 method for determining signal contours, KMPX would provide city-grade service to Decatur. KMPX does not place even a Grade B signal contour over Decatur according to standard Commission prediction curves. *See* Sections 73.684 and 73.699 of the Commission's Rules.

[12] Indeed, in granting the above-referenced modification of construction permit, the Commission noted that it would result in a Grade B gain area encompassing more than 2.1 million persons, in areas near Dallas-Ft. Worth. It also, however, found that the modification would result in a loss of KMPX's Grade B service to 150,000 persons, and that a "white area" of 621 persons and a "gray area" of 1,365 persons would thereby be created. *Decatur Telecasting, Inc., supra* at 8623. Although in granting the modification we found such losses to be theoretical because KMPX had not then commenced service, we are nevertheless concerned that KMPX's emphasis of service to Dallas-Ft. Worth, and away from other segments of the market, raises the question of whether "significant viewing" status, rather than market hyphenation, may be more appropriate to reflect the true nature of KMPX's competition when it is not clear that KMPX competes for audiences and revenues in areas beyond Dallas-Ft. Worth.

[13] *See, e.g., Report and Order* in MM Docket No. 93-291 (Lawrence, MA), 8 FCC Rcd 8171 (1993); *Report and Order* in MM Docket No. 93-303 (Williamsport and Hazleton, PA), DA 93-1449, released December 21, 1993.

[14] *See, e.g., Notice of Proposed Rule Making* in MM Docket 93-291 (Lawrence, Mass.), 8 FCC Rcd 8171, 8172 (1993).

signal[15] or to demonstrate that, without the requested relief, KMPX's viability would be threatened. Moreover, because the station presents "religious/family" programming, the extent of potential copyright liability in this case is not clear.[16] Under Section 111 of the Copyright Act of 1976, title 17 of the U.S. Code, cable carriage of television station that qualifies as a "specialty station" or is considered a "significantly viewed signal" does not incur "distant signal" copyright liability. On the basis of the petitioner's statements, it appears that KMPX might qualify as a "specialty station" or "significant viewed signal" for copyright purposes such that any potential liability might be alleviated.[17] From the information submitted by the petitioner, however, we are unable to assess the impact of any copyright liability on the viability of KMPX.[18]

11. Nevertheless, because the facts before us indicate that KMPX and the stations licensed to Dallas-Ft. Worth may, in fact, be competitive, we believe that the initiation of a rule making proceeding is warranted. Proponents of amendments to Section 76.51 of our Rules, however, should be aware that the standard of proof to change the rules is higher than the standard to simply initiate a rule making proceeding. Under these circumstances, then, it may be helpful to receive additional comment on the issues raised above, as well as the general nature of any competition between KMPX and other stations in the subject market for viewers, programming and advertising revenue.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

12. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided theyare disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

13. Pursuant to applicable procedures set forth in §§1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 7, 1994**, and reply comments on or before **July 22, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 MStreet, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

14. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

15. For additional information on this proceeding, contact Roger Holberg, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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[15] *See, e.g., Notice of Proposed Rule Making* in MM Docket No. 93-207 (Riverside, CA), 8 FCC Rcd 4783 (1993).

[16] The petitioner's assertions as to its particularized need for the requested action, *i.e.*, the effect of the copyright compulsory license, is a factor present in virtually all cases of this type. Of itself, however, this factor is not determinative of the appropriateness of a proposed market adjustment. Rather, it is but one of the many types of evidence the Commission may consider in evaluating the competitive nature of a particular television market.

[17] *See Policy Decision Concerning Cable Compulsory License Specialty Station and Significantly Viewed Signal Determinations*, 54 FR 38461 (1989)(The Copyright Office adopted procedures by which television stations could establish that they qualify as "specialty stations" entitling cable systems to carry their signals at the lower royalty rate for "permitted" signals.).

[18] Similarly, the lack of specific information in the petitioner's submissions does not allow us to assess whether, and to what extent, KMPX actually competes with other stations in the market for the acquisition of programming. *See, e.g., Notice of Proposed Rule Making* in MM Docket No. 93-290 (Newton, NJ/Riverhead, NY), 8 FCC Rcd 8136, 8137, ¶ 7 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

CS Docket No. 94-44

In the Matter of

Amendment of Section 76.51
of the Commission's Rules
to Include Castle Rock, Colorado,
in the Denver, Colorado,
Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: May 5, 1994; Released: May 16, 1994

Comment Date: July 7, 1994
Reply Comment Date: July 22, 1994

By the Chief, Cable Services Bureau:

1. Before the Commission is a petition for rule making filed by LeSEA Broadcasting Corporation, the licensee of television station KWHD(TV), Channel 53 (Independent), Castle Rock, Colorado, to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to add the community of Castle Rock, Colorado, to the Denver, Colorado, television market. *See Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd 2965, 2977-78, n.150 (1993).[1]

BACKGROUND

2. Section 76.51 of the Commission's Rules enumerates the top 100 television markets and the designated communities within those markets. Among other things, this market list is used to determine territorial exclusivity rights under Section 73.658(m) and helps define the scope of compulsory copyright license liability for cable operators. *See* 47 C.F.R. §76.658(m) and 17 U.S.C. §111(f). Some of the markets consist of more than one namedxcommunity (a "hyphenated market"). Such "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. *See CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Market hyphenation "helps equalize competition" where portions of the market are located beyond the Grade B contours of some stations in the area yet the stations compete for economic support. *See Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972).

3. In evaluating past requests for hyphenation of a market, the Commission has considered the following factors as relevant to its examination: (1) the distance between the existing designated communities and the community proposed to be added to the designation; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. Each of these factors helps the Commission to evaluate individual market conditions consistent "with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete."[2]

4. Section 4 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"),[3] which amended Section 614 of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §614, requires the Commission to make revisions needed to update the list of top 100 television markets and their designated communities in Section 76.51 of the Commission's Rules. *See* Section 614(f) of the Act. The Commission stated that where sufficient evidence has been presented tending to demonstrate commonality between the proposed community to be added to a market designation and the market as a whole, such cases will be considered under an expedited rulemaking procedure consisting of the issuance of a Notice of Proposed Rule Making based on the submitted petition.

THE PETITION

5. According to the petitioner, Castle Rock is located approximately 20 miles south of Denver. It states that Castle Rock is included within the Denver Metropolitan Statistical Area (MSA) as designated by the United States Office of Management and Budget.[4] The petitioner also notes that Castle Rock is included by Arbitron in the Denver Area of Dominant Influence (ADI), the Denver Survey Area and the Denver Metro Rating Area. The petitioner further states that KWHD places a Grade B signal over all of Denver and its principal suburbs and the station's coverage area substantially overlaps the coverage areas of the eight television stations that are licensed to Denver. These facts, according to the petitioner, reflect both the commonality of the communities proposed to be added to the market designation and the market as a whole, and that KWHD competes for audiences and revenue in a common television market with the stations licensed to Denver.

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[1] The Commission has delegated authority to the staff to act on petitions for rule making seeking market redesignation and has stated that it expects "that requests for specific hyphenated market changes that appear worthy of consideration will be routinely docketed and issued as rulemaking proposals." *See* Section 0.321 of the Commission's Rules. *See also Report and Order* in MM Docket No. 92-259 (Broadcast Signal Carriage Issues), 8 FCC Rcd at 2977-78, n.150 (1993).

[2] *See, e.g., TV 14, Inc. (Rome, Ga.)*, 7 FCC Rcd 8591, 8592 (1992), *citing Major Television Markets (Fresno-Visalia, California)*, 57 RR 2d 1122, 1124 (1985). *See, also, Press Broadcasting Company, Inc.*, 8 FCC Rcd 94, 95 (1993).

[3] Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[4] The petitioner observes that "the general concept of a metropolitan area [which includes MSA's] is one of a large population nucleus together with adjacent communities which have a high degree of social and economic integration with that nucleus." *Statistical Abstract of the United States 1992*, 112th Edition, U.S. Department of Commerce, Bureau of the census, p. 4.

6. The petitioner further states that although KWHD is unavoidably competitive with the other market-area stations, amendment of the Commission's Rules as proposed is essential to reflect market realities and to equalize competition among the stations. Specifically, the petitioner states that while KWHD is entitled to carriage on Denver-area cable systems by virtue of its inclusion in that ADI,[5] because Castle Rock is not a designated community in the Section 76.51 market listings, the station would be considered a "distant signal" for purposes of compulsory copyright license liability if carried on certain cable systems in the ADI.[6] As a result, the petitioner states, it has already received notifications by several ADI area cable systems that they will not carry the station due to increased copyright liability attendant to the carriage of a "distant signal."[7]

7. The petitioner states that its proposal reflects the Commission definition of a hyphenated television market, *i.e.*, one characterized by more than one population center supporting all stations licensed in the market, including competing stations licensed to different communities within that market area.[8] Specifically, it maintains that the Denver market consists of two population centers -- Denver and its immediately adjacent suburbs forming a single large population center and the community of Castle Rock, some 20 miles to the south, comprising "a less populated but distinctly separate" population center -- both of which are encompassed within the Denver MSA and Arbitron's Denver Rating Area. The petitioner submits that these population centers support all nine market-area stations and, with the exception of one station (KUBD(TV), Channel 59, Denver), all nine Grade B signal contours encompass both communities. Inasmuch as market hyphenations "are based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities," the petitioner states that it meets all the criteria for the requested amendment of Section 76.51. In addition to the proximity of the subject communities and the substantial overlap of signal contours which indicate that the stations in question are unavoidably competitive, the petitioner asserts that any concern that cable carriage might be provided in areas beyond KWHD's Grade B signal contour "would no longer seem to have relevance" under the Commission's ADI-based must-carry rules. Nevertheless, it contends that the majority of the Denver-area cable systems which would be affected by the rule change are within KWHD's Grade B signal contour. The petitioner also states that its particularized need for the requested rule change is demonstrated by the fact that KWHD faces real and immediate concerns that the station will not be carried on area cable systems because of potential copyright liability. Finally, it maintains that the public will benefit from the proposed redesignation because it will bring diversified programming from a local independent UHF station to Denver-area cable viewers.

DISCUSSION

8. Based on the facts presented, we believe that a sufficient case for redesignation of the subject market has been set forth so that this proposal should be tested through the rule making process, including the comments of interested parties. It appears from the information before us that the television stations licensed to Denver and Castle Rock do compete for audiences and advertisers throughout much, if not most, of the proposed combined market area, and that sufficient evidence has been presented tending to demonstrate commonality between the proposed communities to be added to a market designation and the market as a whole. Moreover, the petitioners' proposal appears to be consistent with the Commission's policies regarding redesignation of a hyphenated television market.

9. The Commission has stated that it will not restrict the types of evidence parties may submit to demonstrate the propriety of a market adjustment because each case will be unique to the individual factual situation presented.[9] The petitioner here has alleged that the proximity of the subject communities and the similarity of Grade B signal contours demonstrate the appropriateness of the requested action.[10] Indeed, from the information attached to the petition, it appears that the stations licensed to Castle Rock and Denver have substantially similar signal contours, although KWHD's Grade B signal appears to be subsumed significantly within those of most of the Denver stations. Accordingly, we believe that the initiation of a rule making proceeding is warranted. Proponents of the change requested, however, should be aware that the standard of proof to change the rules is higher than the standard to simply initiate a rule making proceeding. It may therefore be helpful to receive additional comment on the competition

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[5] (*See* Section 76.56(b) of the Commission's Rules.

[6] Stations licensed to communities specifically designated in Section 76.51 are considered local for all cable systems within the 35-mile zones of all listed communities in a given hyphenated market. The absence of Castle Rock as a designated community in this market list generally results in KWHD's classification as a "distant signal" for market-area cable systems more than 35 miles from Castle Rock. By amending Section 76.51 of the Rules to include Castle Rock as proposed, the petitioner asserts that market-area cable systems will be able to carry KWHD on an equal basis with those stations in the market without incurring distant signal liability.

[7] (Section 76.58(d) of the Commission's Rules required a cable operator to notify all local television stations by May 3, 1993, that they may not be entitled to mandatory carriage on the system because such carriage may cause an increased copyright liability to the cable system. Under the provisions of Section 76.55(c)(2) of the Rules, a local commercial television station otherwise entitled to mandatory carriage need not be carried on market-area cable systems if the station is considered a "distant signal" under the copyright compulsory license (17 U.S.C. §111) and the station does not agree to indemnify the cable operator for the increased copyright liability. *See Report and Order* in MM Docket No. 92-259, *supra*, at 2973-74.

[8] *See Cable Television Report & Order*, 36 FCC d 143, 176 (1972).

[9] *See Report and Order* in MM Docket No. 92-259, 8 FCC Rcd at 2977.

[10] The petitioner's assertions as to its particularized need for the requested action, *i.e.*, the effect of the copyright compulsory license, is a factor present in virtually all cases of this type. Of itself, however, this factor is not determinative of the appropriateness of a proposed market adjustment. Rather, it is but one of the many types of evidence the Commission may consider in evaluating the competitive nature of a particular television market.

between KWHD and other stations in the subject market for viewers, programming[11] and advertising revenue, as well as how other media view the market.[12]

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

10. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provided they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

Comment Information

11. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **July 7, 1994**, and reply comments on or before **July 22, 1994**. All relevant and timely comments will be considered before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601 (3) of the Regulatory Flexibility Act. A few cable television system operators will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat.!1164, 5 U.S.C. Section 601 *et seq.* (1981).

Additional Information

13. For additional information on this proceeding, contact Alan E. Aronowitz, Policy and Rules Division, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[11] *See, e.g., Notice of Proposed Rule Making* in MM Docket No. 93-290 (Newton, N.J./Riverhead, N.Y.), 8 FCC Rcd 8136, 8137, ¶ 7 (1993). Moreover, the extent of this petitioner's copyright liability; whether such liability actually threatens the viability of the station; or whether the station might qualify ash) a "specialty station" or "significantly viewed signal" for copyright purposes such that any potential liability might be alleviated are not clear. *See Policy Decision Concerning Cable Compulsory License Specialty Station and Significantly Viewed Signal Determinations*, 54 FR 38461 (1989).

[12] *See, e.g., Notice of Proposed Rule Making* in MM Docket 93-291 (Lawrence, Mass.), 8 FCC Rcd 8171, 8172 (1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

Lenora B. Fulani and Lenora B. Fulani for President,

against

American Broadcasting Companies, Inc., a/k/a/Capital Cities/ABC, Inc.; KHOG-TV, Fayetteville, AR; KHBS-TV, Ft. Smith, AR; KAIT-TV, Jonesboro, AR; KATV-TV, Little Rock, AR; WMTW-TV Auburn, ME; WVII-TV, Bangor, ME; WLOX-TV, Biloxi, MS; WABG-TV, Greenville, MS; WAPT-TV, Jackson, MS; WTOK-TV, Meridian, MS; WLOV-TV, West Point, MS; WTVC-TV, Chattanooga, TN; WBBJ-TV, Jackson, TN; WKPT-TV, Kingsport, TN; WATE-TV, Knoxville, TN; WHBQ-TV, Memphis, TN; WKRN-TV, Nashville, TN; KTVX-TV, Salt Lake City, UT; WVNY-TV, Burlington, VT; KOMO-TV, Seattle, WA; KXLY-TV, Spokane, WA.

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1994; Released: May 16, 1994

By the Commission:

1. The Commission has before it an Application for Review of the Mass Media Bureau's October 21, 1992, ruling[1] on a complaint filed by Lenora B. Fulani and Lenora B. Fulani for President (hereinafter "Fulani") against American Broadcasting Companies, Inc. (hereinafter "ABC").[2]

2. On June 29, 1992, H. Ross Perot appeared on an ABC network program entitled "Who is Ross Perot?," for one hour and forty minutes, beginning at 11:30 pm.[3] This program followed an earlier, different program of the same name which aired from 10:00 to 11:00 pm.[4]

3. The Bureau ruled that the 11:30 program qualified as a bona fide news interview, exempt from the provision of Section 315(a) of the Communications Act. The Bureau found that the program was a regularly scheduled edition of the news interview program "Nightline," even though the program ran under a different name, ran longer than the usual time, and was hosted by Peter Jennings rather than Ted Koppel. Integral here was the Bureau's finding that the "town meeting" or "forum" program format had been used on a regular basis by ABC prior to the "Who is Ross Perot?" program. The Bureau's decision specifically cites Fulani's failure to dispute ABC's claim that it had regularly incorporated the "town meeting" or "forum" program format into its "Nightline" series since 1988. The Bureau also found that the selection as to format, content, and participants was under the exclusive control of ABC and not the candidate; and that the decisions as to the program's content and format were made in the exercise of ABC's good-faith bona fide news judgment and not to promote the candidacy of any particular individual.

4. In her Application for Review, Fulani challenges each of the Bureau's findings above. Generally, Fulani repeats the arguments she made before the Bureau and alleges that the Bureau erred in concluding that the program qualified as a bona-fide news interview.[5] Fulani also argues that the Bureau's ruling, ineffect, exempts time blocks, not programs, and, therefore, ignores the requirements of Section 315(a).

5. In addition, Fulani presents the following new arguments not presented to the Bureau. First, Fulani disputes the relevancy of the list of programs ABC supplied to establish that the "town meeting" or "forum" format was regularly incorporated into the "Nightline" series. While she does not dispute that the format had been employed by ABC prior to the Perot program, Fulani asserts that eight of the thirteen prior programs included "Ted Koppel", "Nightline" or "The Koppel Report" in the title, and that the remainder began with the identifier "ABC News." Because "Who is Ross Perot?" did not contain any of these titles, Fulani argues that the program was not a regularly scheduled edition of "Nightline." Fulani further asserts that even if such an identifier had been used, the program would not be automatically exempt because none of the previous programs featured an appearance by a candidate.

6. Next, Fulani argues that ABC misled viewers as to the extent of journalistic control it asserted over the program, and that the Commission should judge ABC's exercise of control over the program based on what was represented to the viewing audience, rather than the actual control exercised by ABC.[6] Fulani further argues that ABC "perpetrated a fraud" upon the viewing public and, consequently, its actions with regard to the program cannot be considered a good-faith exercise of its news judgment.

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[1] 7 FCC Rcd 6882 (1992).

[2] The complaint was also filed against the above-captioned ABC affiliates which aired the Perot program in states in which both Perot and Fulani were allegedly legally qualified candidates for public office.

[3] As in her original complaint, Fulani refers to the title of this program as "National Town Meeting with Ross Perot," although the ABC transcript submitted as part of the original complaint states the title as "Who is Ross Perot?"

[4] The earlier program, which Fulani does not contend was a use, was a critique of Perot's past activities and character.

[5] Fulani did not file a response to ABC's opposition to the original complaint.

[6] Fulani asserts that ABC deliberately misled viewers because Jennings told the audience that the program was produced in part to respond to Perot's criticisms of the mediating role played by professional journalists, and to allow spontaneous interaction between ordinary citizens and Perot. In addition, she claims that Jennings opened the questioning period by declaring that he did not know what questions were going to be asked.

7. With respect to the Bureau's finding that ABC exercised the requisite control over the program, Fulani now contends that Jennings exercised less control over the program than a talk show host because here the producer, rather than the host, decided which questions would be asked and in what order they would appear. As a final matter, Fulani asks for a hearing on the facts as asserted by ABC in its response to the original complaint.[7]

8. In response to Fulani's new arguments, ABC first argues that, despite variations in program title, length and host, all programs in the "Nightline" series employ a news interview format. ABC states that the "Town Meeting" or "National Town Meeting" title has been employed by ABC with and without a reference to ABC or to Mr. Koppel, and with and without his presence as a host.

9. ABC further contends that the charge that viewers were misled is specious in view of the fact that Jennings stated at the beginning of the program that the audience "which joins us live at our invitation" has come "with questions which they have told our producers they want to ask."[8] ABC argues that the viewers were, therefore, plainly informed that ABC had selected a pool of questioners and that ABC producers had been told of the questions in advance. Consequently, ABC states, Fulani's claim that ABC misled viewers as to the nature of the program, thereby impugning the good faith exercise of its news judgment, is without factual foundation.

10. With respect to the amount of control exercised by Jennings, ABC states that it is indisputable "that Jennings was indeed active, intervening to prevent speeches by questioners, to clarify a question or to bring a questioner back to point."[9]

11. ABC also contends that Fulani cites no authority for her claim of entitlement to a hearing, and that there is nothing in the Communications Act or the Commission's rules that supports such a claim. ABC argues that even if the statute did provide for a hearing, there are no material issues of fact in dispute.

DISCUSSION

12. The Application for Review reveals that Fulani has reasserted questions of law and fact raised before the Bureau and has raised new arguments over which the Bureau has not had an opportunity to pass. Section 1.115(c) of the Commission's rules (47 C.F.R. Section 1.115(c)) provides that an application for review will not be granted if it relies on questions of fact or law upon which the designated authority has not been afforded an opportunity to pass. In the interest of completeness, however, the Commission will address Fulani's newly raised arguments. Regarding those arguments previously raised before the Bureau, Fulani has submitted no information or made any arguments which would indicate that the Bureau erred in its findings.

13. With respect to those arguments raised now for the first time, we find that Fulani presents no basis upon which to reverse the Bureau's determination.[10] We cannot conclude that ABC was unreasonable in the exercise of its news judgment in airing the program. First, we cannot conclude that because the words "Nightline", "Ted Koppel", or the "Koppel Report" were not used in the title, the Perot program was not a regularly scheduled edition of "Nightline." We find persuasive the fact that ABC has employed the "town meeting" format, in which questions are posed from the audience and cleared by ABC personnel,[11] on a number of occasions over a period of years. While the titles of these programs have sometimes changed, their format has remained constant. Accordingly, we conclude that ABC has regularly incorporated the "town meeting" format into its "Nightline" series. Further, after a careful review of the information before the Commission, it appears that "Who is Ross Perot?" conforms to previous programs aired on the "Nightline" series, and that the program qualifies as an exempt news interview pursuant to Section 315(a)(2).[12] Since there is ample evidence that this same format has regularly been used for other programs in the "Nightline" series, we reject Fulani's assertion that exemption of the program creates an exemption for "blocks of time," rather than programs.

14. Next, there is nothing before us to indicate that the viewers of "Who is Ross Perot?" were misled as to the nature of the program. The viewers were informed that ABC had selected a pool of questioners and that ABC's producers had been told of the questions in advance. Jennings statement that he personally did not know what questions would be asked cannot reasonably be construed as a representation that ABC would permit any and all questions to be aired, despite their insignificance or offensive nature.[13] Further, having determined that ABC made no misrepresentation to its viewers concerning the program, there is no basis for Fulani's argument that the good faith exercise of ABC's news judgment has come into question.

15. Moreover, it does not follow that because Jennings, himself, was unaware of the questions which would be asked, he was not in control of the program. As ABC

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[7] ABC responded to Fulani's Application for Review on December 14, 1992, and Fulani replied on January 11, 1993. In addition, oppositions were filed by most of the ABC affiliates.

[8] Opposition at 9.

[9] Opposition at 7.

[10] When Congress enacted the Section 315(a) exemptions to candidate uses, there was no indication that it intended the Commission to take an unduly restrictive approach which would discourage news coverage of political activities or candidates. Rather, Congress intended that the Commission would determine whether the broadcaster had, in such cases, made reasonable news judgments of certain events and of individual candidacies. In so doing, the Commission would further innovative programming with respect to coverage of political campaigns. *See Aspen Institute*, 55 FCC 2d 719 (1975), *aff'd sub nom. Chisholm v. FCC*, 538 F.2d 349 (1976).

[11] The Commission has previously determined that such formats fall under the news interview exception. *See Multimedia Entertainment, Inc.*, 56 RR 2d 143 (1984).

[12] Having found that the program is exempt, it is irrelevant that other programs under the "town meeting" format have not included candidates.

[13] ABC argues that the issue of whether the viewers were misled is irrelevant to the Commission's consideration of whether the program is exempt. Because we find that Fulani has made no showing that the viewers were misled by ABC, we do not find ourselves presented with this issue. Accordingly, we make no determination on the question of whether control of a program for purposes of Section 315(a) exemptions should be judged by the amount of control revealed to the public or that actually exercised.

points out, a review of the transcript indicates that Jennings, and not Perot, was in control throughout the program.[14]

16. Last, we see no basis for Fulani's request for an evidentiary hearing. In *Lowest Unit Charge Requirements of Section 315(b)*, 7 FCC Rcd 4123, 4127 (1992), we stated:

> Section 315(b) does not require lowest unit charge disputes to be determined "on the record after opportunity for an agency hearing." . . . The Commission has broad authority to establish *individually tailored procedures* to carry out its responsibilities under the [Communications] Act, including the enforcement of Section 315. [emphasis added].

Section 315(a) also does not require resolutions of complaints by an agency hearing, and we decline to impose such a requirement in this case. Moreover, for the reasons stated above, we do not find that Fulani has established that a substantial and material question of fact is in dispute.

17. In view of the above, Fulani's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[14] Opposition at 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 17, 1994

AMERITECH FILES REVISION TO ITS COST ALLOCATION MANUAL TO UTILIZE A STATISTICAL SAMPLING PROCESS FOR TECHNICIAN TIME REPORTING

PUBLIC COMMENT INVITED

On April 29, 1994, the Ameritech Operating Companies -- Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. -- filed a revision to their cost allocation manual (CAM) to utilize a statistical sampling process for technician time reporting. The statistical sampling process which Ameritech calls the Enhanced Time Distribution Process (ETDP) is to be effective July 1, 1994, and if approved, will replace the current process by which all technicians report their daily work activities. Under ETDP, only the technicians selected by random sampling will report their daily work activities by time reporting.

Parties may file comments on Ameritech's CAM change no latter than **June 11, 1994**. Replies should be files by **June 25, 1994**. Comments should reference AAD 94-59. A copy of each pleading should be sent to Ed Dashkin, FCC, Common Carrier Bureau, 2000 L St., N.W., Suite 812, Washington, D.C. 20554 and the International Transcription Service (ITS), 2100 M St., N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L St., N.W., Suite 812, Washington, D.C. Copies are also available from ITS.

For further information contact Ed Dashkin at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri	CSR-4068-M
State University against	MO0933
First Cable of Missouri, Inc.	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1994; Released: May 17, 1994

By the Chief, Cable Services Bureau:

1. On September 20, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that First Cable of Missouri, Inc. ("First Cable"), operator of a cable television system serving Syracuse, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Syracuse at Latitude 38°40'00", Longitude 92°52'30", and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order First Cable to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Syracuse system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed September 20, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and First Cable of Missouri, Inc. IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty- five (45) days from the release date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] KMOS-TV states in its petition that First Cable offered to supply A-B switches to its subscribers in lieu of carrying the station. KMOS-TV informed them that this was unacceptable, but did offer to extend extra time for the system to add the signal. No response to KMOS-TV's suggestion was received.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

William H. Johnson, Deputy Chief
Cable Services Bureau

In re:

Complaint of Central Missouri	CSR-4072-M
State University against	MO0965
First Cable of Missouri, Inc.	

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1994; Released: May 17, 1994

By the Chief, Cable Services Bureau:

1. On September 20, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that First Cable of Missouri, Inc. ("First Cable"), operator of a cable television system serving Harrisburg, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Harrisburg at Latitude $39^{0}08'30"$, Longitude $92^{0}27'30"$, and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order First Cable to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Harrisburg system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed September 20, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and First Cable of Missouri, Inc. IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty- five (45) days from the release date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

[1] KMOS-TV states in its petition that First Cable offered to supply A-B switches to its subscribers in lieu of carrying the station. KMOS-TV informed them that this was unacceptable, but did offer to extend extra time for the system to add the signal. No response to KMOS-TV's suggestion was received.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Lake Cable, Inc.	CSR-4070-M MO0498

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1994; Released: May 17, 1994

By the Chief, Cable Services Bureau

1. On September 20, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Lake Cable, Inc. ("Lake"), operator of a cable television system serving Tan-Tar-A, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses "the system's principal headend at Tan-Tar-A"[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Lake to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. In support of its petition, KMOS-TV states that its request for carriage on the Tan-Tar-A system was denied by Lake on June 17, 1993, because Lake did not believe that KMOS-TV's Grade B contour encompassed its headend and, further, that the system was already carrying a qualified NCE station, KOZK (Educ., Ch. 21), Springfield, Missouri, whose Grade B contour did cover the system. KMOS-TV indicates that it commissioned an independent consulting firm[2] to corroborate the Grade B radius of each station. That study, it maintains, indicates that the Grade B contour of KMOS-TV does indeed encompass the Tan-Tar-A system while that of KOZK does not. However, KMOS-TV states Lake has still not added its signal.

3. While we cannot accept the findings as to the accuracy of the Grade B contour survey commissioned by KMOS-TV without verifying whether the methodology used meets with that accepted by the Commission, our own analysis, within the information available, appears to indicate that the Tan-Tar-A headend lies within both KMOS-TV's and KOZK's Grade B contours. We note that in its letter refusing carriage, Lake cited its carriage of KOZK and §5(c) of the 1992 Cable Act as its reasons for denial. Section 5(c) states that a cable system "shall not be required to carry the signal of any additional qualified local noncommercial educational television stations affiliated with the same network if the programming of such additional stations is substantially duplicated by the programming of the qualified local noncommercial educational television station receiving carriage." However, beyond a vague assertion that KMOS-TV duplicates KOZK, Lake has provided no showing to the Commission to substantiate its claim. Absent such a showing, or any other valid reason, we cannot conclude that KMOS-TV is not a must-carry station on the Tan-Tar-A system.

4. KMOS-TV's petition establishes that it is entitled to carriage on the Tan-Tar-A system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under §5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed September 20, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Lake Cable, Inc. IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated pursuant to §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] We note that Lake has not provided its headend coordinates to KMOS-TV as required by §76.58(b) of the Rules, despite KMOS-TV's letter of May 17, 1993 requesting carriage. Since no formal opposition to KMOS-TV's complaint has been filed, we accept petitioner's conclusion that Lake's headend for this system is located at Tan-Tar-A, Missouri.

[2] D.L. Markley & Associates, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against First Cable of Missouri, Inc.	CSR-4067-M MO0963

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1994; Released: May 17, 1994

By the Chief, Cable Services Bureau:

1. On September 20, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that First Cable of Missouri, Inc. ("First Cable"), operator of a cable television system serving Eugene, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Eugene at Latitude 38°21'30", Longitude 92°24'00", and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order First Cable to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to "this petition has been filed. "[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Eugene system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed September 20, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and First Cable of Missouri, Inc. IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] KMOS-TV states in its petition that First Cable offered to supply A-B switches to its subscribers in lieu of carrying the station. KMOS-TV informed them that this was unacceptable, but did offer to extend extra time for the system to add the signal. No response to KMOS-TV's suggestion was received.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Communications
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against First Cable of Missouri, Inc.

CSR-4069-M
MO0931

Request for Carriage

William H. Johnson, Deputy Chief
Cable Services Bureau

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1994; **Released: May 17, 1994**

By the Chief, Cable Services Bureau:

1. On September 20, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that First Cable of Missouri, Inc. ("First Cable"), operator of a cable television system serving Clarksburg, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Clarksburg at Latitude 38°39'33", Longitude 92°39'48", and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order First Cable to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.[1]

2. KMOS-TV's petition establishes that it is entitled to carriage on the Clarksburg system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed September 20, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and First Cable of Missouri, Inc. IS ORDERED to commence carriage of KMOS-TV on cable channel 6, forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

[1] KMOS-TV states in its petition that First Cable offered to supply A-B switches to its subscribers in lieu of carrying the station. KMOS-TV informed them that this was unacceptable, but did offer to extend extra time for the system to add the signal. No response to KMOS-TV's suggestion was received.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Douglas Cable Communications — CSR-3965-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1994; Released: May 18, 1994

By the Chief, Cable Services Bureau:

1. On July 8, 1993, a petition on behalf of Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, was filed with the Commission claiming that Douglas Cable Communications ("Douglas"), operator of a cable television system serving Cass County, Missouri, had declined to carry the station, even though the Grade B contour of KMOS-TV encompasses the system's principal headend at Greenwood[1] and the station is therefore a "local" signal within the meaning of §5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KMOS-TV requests that the Commission not only order Douglas to carry its signal on the cable system, but also order that the system carry it on Channel 6, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. KMOS-TV's petition establishes that it is entitled to carriage on the Cass County system and it has requested carriage on its over-the-air broadcast channel, as it is permitted to do under Section 5 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed July 8, 1993, by Central Missouri State University IS GRANTED, in accordance with §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Douglas Cable Communications IS ORDERED to commence carriage of KMOS-TV on cable channel 6 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] We note that Douglas has not provided its headend coordinates to KMOS-TV as required by Section 76.58(b) of the Rules, despite KMOS-TV's November 25, 1992 letter requesting carriage. Since no opposition to KMOS-TV's complaint has been filed, we accept petitioner's conclusion that Douglas' headend for this system is located at Greenwood, Missouri.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of	CSR-3977-M; MO0409
Central Missouri	CSR-3991-M; MO0154
State University against	CSR-3992-M; MO0196
Jones Intercable	CSR-3993-M; MO0282
Investors, L.P.	CSR-3994-M; MO0702
	CSR-3995-M; MO0328
	CSR-3996-M; MO0293
	CSR-3997-M; MO0272
	CSR-3998-M; MO0402

Requests for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 3, 1994; Released: May 18, 1994

By the Chief, Cable Services Bureau:

1. On August 2, 1993, Central Missouri State University, licensee of Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri, filed petitions with the Commission requesting that it be considered to be a must-carry station in the communities of Greenwood, Blue Springs, Lees Summit, Oak Grove, Odessa, Pleasant Hill, Grain Valley, Lake Lotawana and portions of Cass County, Missouri, all of which are served by Jones Intercable Investors, L.P. ("Jones"). An opposition to these petitions was filed on August 26, 1993, on behalf of Jones to which KMOS-TV responded on September 13, 1993. Jones filed a reply to KMOS-TV's response on Setpember 22, 1993.

2. Initially, KMOS-TV states that all of the listed communities are served from the same headend, which is located in Raymore, Missouri at north latitude 38°50'20" and west longitude 94°26'07". KMOS-TV indicates that it requested carriage in each of these communities on November 25, 1992, but was subsequently informed by Jones on June 9, 1993 that it was not entitled to carriage since the system's principal headend was located outside of KMOS-TV's predicted Grade B contour. KMOS-TV adds that it was also informed by Jones that the station did not provide a good quality signal at the system's principal headend. While KMOS-TV concedes that Jones's headend at Raymore does indeed fall outside of its Grade B contour,[1] and that therefore KMOS-TV is not a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), it points out that all of the referenced communities do fall within its Grade B contour and the people in these communities should be entitled to view all local broadcast signals over their cable system. KMOS-TV argues that using a cable system's primary headend location as the indisputable determinate for must-carry rights makes a mockery of the 1992 Cable Act, particularly in a situation such as this where the cable system is regional in composition with a primary headend at some distance from the population served. KMOS-TV concludes that, regardless of the location of Jones's primary headend, the system should be required to carry it in the referenced communities. With regard to the questions raised as to signal quality, KMOS-TV states that it feels it can provide an attainable signal at the Raymore headend site as long as standard engineering practices are used to receive and process its signal and it is willing to work with Jones in achieving a good signal.

3. In its opposition, Jones maintains that it is undisputed that, due to the location of its primary headend, KMOS-TV is not entitled to carriage under the provisions of the 1992 Cable Act. It argues that KMOS-TV's request herein would require an amendment to the Act which is beyond the authority delegated to the Commission. Finally, it states that whether or not KMOS-TV's signal is raised to sufficient levels to provide a good quality signal, the fact remains that the station is not qualified for must-carry status.

4. In response, KMOS-TV submits two independent engineering studies[2] which indicate that when actual terrain factors are taken into consideration, its Grade B signal is sufficient to reach the location of Jones' primary headend. Further, after reviewing the signal reception test Jones conducted on its signal, KMOS-TV states that it feels that the data was, at best, incomplete and not conducted using standard engineering practices. In light of these factors, KMOS-TV reiterates is request for carriage in the listed communities.

5. Jones' reply states that the 1992 Cable Act requires that a station's Grade B contour, as defined in §73.683(a) of the Commission's Rules, cover a cable system's principal headend in order to be entitled to must-carry status. Jones argues that it is irrelevant that KMOS-TV's signal strength is above the required levels for a Grade B station over the subject cable communities. It asserts that it is evident from the contour map submitted by KMOS-TV that Raymore does not fall within the station's Grade B contour. Jones maintains that if KMOS-TV seeks to establish a change in its Grade B contour it must do so in a separate proceeding using appropriate and precise actual measurements to demonstrate the contour's actual presence, not the alternative prediction method[3] it submitted here.

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[1] A check of our records also indicates that Raymore is more than 50 miles from Sedalia, Missouri, KMOS-TV's city of license.

[2] The two surveys were performed by: 1) TA Services of Boulder, Colorado, a division of NTIA, the United States Department of Commerce, which used data pertaining to KMOS-TV's actual broadcast signal, factoring in actual terrain data as compiled by a division of the United States government; and 2) D.L. Markley & Associates of Peoria, Illinois, which used verifiable data from KMOS-TV's broadcast signal factored in with actual terrain data from geographical coordinates north latitude 38°50'20", west longitude 94°27'07", the location of Jones' primary headend.

[3] Section 73.684(f) allows for alternative predictions where terrain in one or more directions from the antenna site departs widely from the average elevation of the 3.2 to 16.1 kilometer sector. In instances where the alternative prediction method is used, it is necessary to provide supportive information. The supplemental information required includes: contour distances as determined by other means, descriptions of the procedure

6. We are not persuaded by KMOS-TV's requests to be considered local in the above-referenced communities. §76.55(b) of the Commission's Rules defines a qualified noncommercial educational station as either one whose community of license is located within fifty miles of a cable system's principal headend or one whose Grade B service contour encompasses the principal headend. When the Commission adopted its prescribed prediction method for the calculation of Grade B contours in the mid-1970s, it recognized that the Grade B contour was not a wall within which all services provided by a television station were confined, and, therefore, the determination of its location by the most precise means available may not be well worth the complication which might be involved. Further, since the contour prediction method, as prescribed by the Commission, is primarily an administrative tool, it seems clear that contours should be located by means which promote the most efficient administration, i.e., by a relatively simple procedure which produces a speedy and unequivocal result. That policy still holds true today and apparently was the intent of Congress in the 1992 Cable Act when it cited §73.683(a) as the sole reference for Grade B contour definitions.

7. We therefore reject KMOS-TV's assertions that, based upon alternative Grade B prediction methods, its station's Grade B contour emcompasses Jones' Raymore headend. Relying on the Commission's prescribed predicted Grade B contour method, KMOS-TV does not encompass the Raymore headend and, therefore, it does not qualify for must-carry status under this criterion in the subject communities.

8. In view of the foregoing, therefore, the 1992 Cable Act does not entitle KMOS-TV to mandatory carriage on the Jones cable television system serving the communities of Greenwood, Blue Springs, Lees Summit, Oak Grove, Odessa, Pleasant Hill, Grain Valley, Lake Lotawana and portions of Cass County, Missouri, and the complaints filed August 2, 1993, by Central Missouri State University ARE DISMISSED pursuant to authority delegated pursuant to §0.321 of the Commission's Rules and §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

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employed, sample calculations, and maps of predicted coverage which should include both the coverage as predicted by the regular method and as predicted by the supplemental method. In any event, Jones did not comply fully with these requirements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

FCVS COMMUNICATIONS (WACH) CSR-3464

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1994; Released: May 18, 1994

By the Commission:

1. On March 24, 1993, FCVS Communications ["WACH"], licensee of Television Broadcast Station WACH (Ind., Channel 57), Columbia, South Carolina, filed a petition for reconsideration of the Commission's decision in *FCVS Communications (WACH)*, 8 FCC Rcd 1279 (1993) [*"FCVS II"]. WACH's petition is opposed by Columbia Television Broadcasters, Inc. ["WOLO-TV"], licensee of Station WOLO-TV (ABC, Channel 25), Columbia, South Carolina, and WACH has replied.*

2. WACH began operation on October 2, 1981 (as Station WCCT-TV), broadcasting largely religious programming. At that time, WACH operated with maximum visual effective radiated power of 637 kilowatts (63.7 kW aural) and height above average terrain of 582 feet. On May 11, 1988, WACH was acquired by its present licensee. Within a month, WACH instituted a new, nonreligious program schedule and concluded an affiliation agreement with the Fox Broadcasting Company. WACH also upgraded the station's technical facilities, increasing the effective visual radiated power of the station to 5,000 kilowatts (500 kW aural) and height above average terrain to 633.04 feet, allowing WACH to institute Grade B service to Orangeburg, Newberry, and portions of Bishopville, South Carolina. These changes resulted in increases in total population and geographic area served of 16.64% and 22.2% respectively. In 1990, WACH filed a petition for special relief with the Commission, contending that in view of both the station's technical upgrades and the station's switch to broadcasting as a "general market independent station" instead of as a specialty station, WACH should be considered a "new" station for purposes of determining its status as significantly viewed, pursuant to §76.54 of the Rules. Consideration as a "new" station, WACH notes, would allow it to demonstrate its status as significantly viewed utilizing current county-wide data, rather than current community-specific data or county-wide data from the period 1981-1984, the station's first three years of operation as WCCT-TV. In *FCVS Communications (WACH)*, 6 FCC Rcd 3670 (1991) [*"FCVS I"], the staff denied WACH's request, noting:*

> In those cases in which we have permitted stations already on the air to be treated as "new" for such purposes, the station in question did more than merely seek to offer programming thought to be more attractive to its existing potential audience base. Rather, the station underwent very extensive technical improvements which significantly increased its coverage potential . . . or, alternatively, the station switched from an STV or non-commercial mode of operation to a commercial mode of operation . . . changes which altered the basic terms of providing its broadcast service.

FCVS I at 3671 (citations and footnotes omitted). The staff decision went on to conclude that neither WACH's technical improvements nor its change in program content was of sufficient magnitude to enable it to be considered a "new" station, citing *KXTX, Inc.*, 6 FCC Rcd 68 (1990); *Nationwide Communications, Inc. (KITN)*, 6 FCC Rcd 52 (1990); and *Boston Broadcasters, Inc.*, 42 FCC 2d 669 (1973).

3. WACH sought Commission review of *FCVS I, supra*, arguing that a change in program content from specialty to nonspecialty does create a "new" station, as evidenced by WACH's increased popularity, which is also a function of and buttressed by the station's technical improvements. WACH also urged that it be treated equitably with WOLO-TV and Station WCBD-TV (ABC, Channel 2), Charleston, South Carolina, both of which achieved significantly viewed status in 1972 based on county-wide data. In *FCVS II, supra*, the Commission denied WACH's request, finding that WACH's arguments concerning programming and equitable treatment are identical to those raised in *KXTX, Inc., supra*, and in *Nationwide Communications, Inc., supra*, and are equally unpersuasive. The Commission declined to evaluate the relative substantiality of program format changes, citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981). Finally, the Commission noted that WACH has increased its Grade B coverage area by only 22.2%, which does not approach the type of very extensive and atypical change on which previous waivers were based, citing *American Valley Broadcasting Company (WAFF)*, Cable Television Report No. 3553 (released December 7, 1989) and *Taft Television Radio Company, Inc.*, 103 FCC 2d 883 (1986). WACH seeks reconsideration of this decision.

4. In support of its petition for reconsideration, WACH argues that enactment of the Cable Television Consumer Protection and Competition Act of 1992 ["the Cable Act"] has significantly redefined the relationship between television stations and cable systems, warranting treating WACH equally vis-a-vis its market competitors by allowing it to demonstrate its status as significantly viewed using county-wide data. Citing *Spartan Radiocasting Co. v. FCC*, 619 F. 2d 314 (4th Cir. 1980), WACH contends that the Commission must allow cable subscribers to have access to those stations on their cable systems that they would otherwise receive over-the-air.

5. In opposition, WOLO-TV argues that nothing in the Cable Act modifies the manner in which the Commission treats the relationship between competing television stations, nor requires the Commission to afford WACH special treatment. *Spartan Radiocasting Co. v. FCC, supra*, is irrelevant, WOLO-TV contends, as the case simply upheld the Commission's network program nonduplication protection rules. In reply, WACH claims that WOLO-TV has made no material arguments against WACH's contentions.

6. We will deny WACH's petition for reconsideration. WACH has failed to demonstrate on reconsideration any manifest error or omission so material as to warrant a change of our earlier decision here. Nor has it raised any new factor or arguments that would cause us to depart

from our earlier conclusions. The Cable Act was enacted on October 5, 1992, well over four months prior to our decision in *FCVS II, supra,* and WACH presents no reason that it could not have timely raised this as an issue prior to our acting on its application for review in *FCVS II, supra.* Thus, §1.106(b)(2) of the Rules militates against our acting on WACH's petition. In any event, we agree with WOLO-TV that nothing in the Cable Act requires us to find that technical improvements of the type involved here qualify a station for special relief as a "new" station, or that we should involve ourselves in determining the relative substantiality of changes in program content. We further agree with WOLO-TV that *Spartan Radiocasting Co. v. FCC, supra,* is not germane to the issues before us.

7. In view of the foregoing, we find that grant of WACH's petition is not in the public interest.

8. Accordingly, IT IS ORDERED, That the petition for reconsideration (CSR-3464) filed March 24, 1993, by FCVS Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Greater Dayton	CSR-4041-M
Public Television against	CSR-4042-M
Sammons Communications	IN0131

Requests for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1994; Released: May 18, 1994

By the Chief, Cable Services Bureau:

1. On August 30, 1993, petitions on behalf of Greater Dayton Public Television, licensee of Television Broadcast Stations WPTD (Educ., Ch. 16), Dayton, Ohio, and WPTO (Educ., Ch. 14), Oxford, Ohio, were filed with the Commission claiming that Sammons Communications ("Sammons"), operator of a cable television system serving Brookville, Indiana,[1] had declined to carry the stations, even though the cities of license of WPTD and WPTO are within fifty miles of the system's principal headend located in Brookville at N. Latitude 39°25'23" and W. Longitude 85°01'53", and the stations are therefore "local" signals within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). WPTD and WPTO also request that the Commission not only order Sammons to carry the signals, but also order the system to carry them on Channels 16 and 14, respectively, the channels on which they broadcast over-the-air. An opposition to these petitions has been filed on behalf of Sammons to which petitioner has responded.

2. In support of its petitions, WPTD and WPTO state that on May 3 and 24, 1993, respectively, each was informed by the system's previous owner, Cardinal Communications, Inc. ("Cardinal"), of its station's signal strength deficiency at the Brookville headend, however, no specific data were attached. At the same time, WPTD indicates that it was also informed of Cardinal's concerns over the possibility of increased copyright costs should WPTD be carried. By letter dated May 28, 1993, WPTD formally requested carriage on the Brookville system and agreed to indemnify Cardinal for any increased copyright costs once specific estimates were supplied and reasserted it rights to carriage on cable channel 16. To date, WPTD maintains that no copyright estimates have been received. On the same date, WPTO rejected Cardinal's notice regarding its signal strength as untimely and failing to provide specific measurement information. In that letter, WPTO also reasserted its own carriage rights on cable channel 14. Subsequently, on June 10, 1993, petitioners state that Cardinal submitted signal strength test information which indicated a measurement of -45 dBm[2] for both WPTD and WPTO and requested costs for equipment in advance of the stations' carriage. Both stations point out, however, that on the test sheet provided by Cardinal the system indicates a yes in response to a question as to whether the signals meet the signal quality standards. On June 28, 1993, WPTD and WPTO again requested carriage and asserted that since both stations provide a good quality signal they are not responsible for the costs of any additional equipment. On July 6, 1993, just prior to the system's sale to Sammons, Cardinal indicated to WPTD and WPTO that a further review of the signal quality and equipment cost estimates was necessary. Nevertheless, petitioners aver that once Sammons was advised of the situation after the sale, it refused to carry the stations until such time as the system is reimbursed for the costs of additional equipment. To date, petitioners argue, neither station has been added to the Brookville system.

3. In its response, Sammons states that it has had ongoing discussions regarding the carriage of WPTD and WPTO, but the stations have never been carried on the Brookville system in the past and no equipment is located on the tower which would enable it to receive the signals. Sammons maintains that the *Clarification Order in MM Docket No. 92-259*, 8 FCC Rcd 4142 (1993), requires the broadcaster, and not the system, to bear the cost of any specialized antennas or equipment necessary for the reception of a signal. It argues that in this instance it is only asking WPTD and WPTO to pay for the cost of the antenna while Sammons states that it will buy other necessary equipment.

4. WPTD and WPTO state in reply that the *Clarification, supra,* requires a broadcaster to reimburse a system for equipment only in instances where such equipment is necessary to receive a good quality signal. In this case, petitioners aver, test results have shown that both WPTD and WPTO provide a good quality signal to the Brookville headend. Therefore, they insist, they are not required to pay for the cost of an antenna.

5. We are not persuaded by Sammons' request that WPTD and WPTO be required to reimburse the system for the cost of an antenna to receive the signals. The *Report and Order in MM Docket No. 92-259*, at paragraph 104 states that ". . . we generally agree . . . that it is the television station's obligation to bear the costs associated with delivering a good quality signal to the system's principal headend (emphasis supplied.)" Further, at paragraph 11 of the *Clarification, supra,* we state that "cable operators may not shift the costs of routine reception of broadcast signals to those stations seeking must-carry status." In the instant case, Sammons does not dispute that WPTD and WPTO provide good quality signals to its headend. Therefore, WPTD and WPTO are not obligated to provide the cost of any equipment Sammons feels necessary to receive their signals.

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[1] The Brookville system was operated by Cardinal Communications, Inc. up until July 22, 1993, when it was purchased by Sammons.

[2] A standard of -45 dBm was established for determining the availability of UHF commercial stations at a cable system's headend. Since these standards address the issue of availability of a station's signal, consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as prima facie tests to initially determine whether a NCE station provides a cable system with a good quality signal.

6. WPTD and WPTO's petitions establish that they are entitled to carriage on the Brookville cable system, and they have requested carriage on their over-the-air broadcast channels, as they are permitted to do under Section 5 of the 1992 Cable Act. Accordingly, the petitions filed August 30, 1993, by Greater Dayton Public Television ARE GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Sammons Communications IS ORDERED to commence carriage of WPTD and WPTO on cable channels 16 and 14, respectively, forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

William H. Johnson, Deputy Chief
Cable Services Bureau

In re:

Complaint of Hispanic Community Educational TV, Inc. against Paragon Cable of San Antonio	CSR-4048-M TX0505

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1994; Released: May 18, 1994

By the Chief, Cable Services Bureau:

1. On August 16, 1993, a petition on behalf of Hispanic Community Educational TV, Inc., licensee of Television Broadcast Station KHCE (Educ., Ch. 23), San Antonio, Texas,[1] was filed with the Commission claiming that Paragon Cable of San Antonio ("Paragon"), operator of a cable television system serving San Antonio, Texas, had declined to carry the station, even though KHCE is licensed to the same community which Paragon serves and and is therefore a "local" signal within the meaning of §4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). KHCE requests that the Commission order not only order Paragon to carry its signal on the cable system, but also order that the system carry it on Channel 23, the channel on which it broadcasts over-the-air. No opposition to this petition has been filed.

2. In support of its petition, KHCE states that San Antonio is a predominantly Hispanic city and that with approximately one-half of the city's population subscribing to cable, it is unable to effectively reach its entire city of license. Further, it maintains that Paragon's refusal to carry its signal has created an undue financial hardship upon the station.

3. KHCE's petition establishes that it is entitled to carriage on the San Antonio system as a commercial station licensed to the same ADI market as the cable system. It is also entitled to the requested carriage on its over-the-air broadcast channel, as it is permitted under Section 4 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the complaint filed August 16, 1993, by Hispanic Community Educational TV, Inc. IS GRANTED, in accordance with §614(h)(1)(A) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Paragon Cable of San Antonio IS ORDERED to commence carriage of KHCE on cable channel 23 forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

[1] While KHCE is licensed as an educational station by the Commission, the petitioner indicates that its station does not meet all the criteria set forth in Section 5 for classification as a noncommercial station for must-carry purposes.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MFS INTERNATIONAL, INC. File No. I-T-C-94-050

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in transatlantic cable systems for the provision of authorized direct, facilities-based international common carrier services between the United States and the United Kingdom, Ireland, France, Germany and the Netherlands, and for use of the authorized capacity in transit arrangements for indirect service between the United States and the United Kingdom, Ireland, France, Germany, the Netherlands, Austria, Belgium, Denmark, Finland, Italy, Norway, Portugal, Spain, Sweden, and Switzerland.

MEMORANDUM OPINION, ORDER AND CERTIFICATE

Adopted: May 6, 1994; Released: May 18, 1994

By the Chief, International Facilities Division:

1. The above-captioned uncontested application filed by MFS International, Inc. (MFSI)[1] requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214 (1982), and Section 63.01 of the Commission's Rules, 47 C.F.R. Section 63.01 (1992), to acquire and operate capacity on an Indefeasible Right of User (IRU) basis in the Private Transatlantic Telecommunications cable system (PTAT-1)[2] and the Transatlantic telecommunications cable systems (TAT-8, TAT-9, TAT-10, and TAT-11) for the provision of switched services, private line services, and television relay services.[3] Specifically, MFSI seeks authority to (1) acquire and operate the requested facilities for direct service between the United States and each of the following international points: United Kingdom, Ireland, France, Germany, and the Netherlands;[4] (2) use the requested facilities for service to the international points specified in Appendix B through transiting arrangements with its correspondents; and (3) acquire by lease and operate such facilities as may be necessary to extend capacity in the cable systems and to link the U.S. cable landing stations with MFSI's technical operations enter in Jersey City, New Jersey.[5] The application was placed on public notice on November 24, 1993. No comments were received.

2. MFSI seeks authority to obtain the requisite capacity for the common carrier services it proposes herein from the PTAT and TAT-8, TAT-9, TAT-10, and TAT-11 cable systems to compete with multiple established service providers that already provide authorized international common carrier services between the U.S. and the countries identified in Appendices A and B utilizing these cable

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[1] MFSI is a newly-formed corporation organized under the laws of Delaware, it is a wholly-owned subsidiary of MFS Communications Company, Inc. (MFSCC).

[2] PTAT is a noncommon carrier submarine cable facility extending between the United States, the United Kingdom, and the Republic of Ireland.

[3] The Commission authorizes utilization of facilities between the U.S. and terminal countries in conjunction with transiting arrangements between correspondents providing for service to third countries. *See, e.g., MCI Telecommunications Corp.*, DA 93-1184 (Int'l. Fac. Div., Oct. 5, 1993), File Nos. I-T-C-93-249, I-T-C-93-282 (authorizing establishment of service on a switched transit basis); *Micronesian Telecommunications Corp.*, File No. I-T-C-92-15 (Int'l. Fac. Div., Sept. 20, 1993) (DA 93-1118); *US Sprint Communications Company Limited Partnership*, 4 FCC Rcd. 6279 (Chief, Com. Car. Bur. 1989) (authorizing utilization of the authorized facilities to both the cable terminal countries and to points beyond through extension of facilities to the borders of other countries or to the terminals of other international communications systems). MFSI is required to file its correspondent agreements with the Commission pursuant to Section 43.51 of the Commission's Rules. Should MFSI want to provide direct service to any country listed in Appendix B that is not also listed in Appendix A, it must obtain prior authority under Section 214 to acquire and operate such facilities.

[4] MFSI intends to enter into agreements with foreign correspondent carriers in the countries to which it provides international telecommunications services pursuant to authority granted in the above-referenced application proceeding. At this time, MFSI expects that correspondent negotiations will first be initiated with the two authorized international facilities-based carriers in the United Kingdom (British Telecommunications plc and Mercury Communications Limited). MFSI also intends to commence correspondent negotiations with the monopoly carriers in Ireland (Telecom Eirann), France (France Telecom), Germany (Deutsche Bundespost Telekom), and the Netherlands (PTT Telecom Netherlands). *See* Letter of Helen Disenhaus, Counsel for MFSI to Jennifer Warren, Esq., Common Carrier Bureau (dated May 6, 1994). We note that a complaint now pending before the Commission, AT&T v. WorldCom, File No. E-93-103, filed September 24, 1993, raises the issue of whether a U.S. facilities-based carrier, not authorized to provided international private line resale, operating in correspondence with a carrier operating at the U.K. end as an international reseller should be categorized as a reseller at the U.S. end.

[5] On March 31, 1994, MFSI, by letter, confirmed that its request to provide "television relay service" would allow broadcasters and others to transmit full-motion, broadcast-quality television signals between the United States and authorized foreign countries. MFSI further clarified that its request for one DS-3 circuit on each common carrier cable and two DS-3 circuits on PTAT will be sufficient for all of its proposed services, including television relay service. *See* Letter of Helen E. Disenhaus, Esq., Counsel to MFSI to Jennifer Warren, Esq.,

systems. This objective is consistent with the Commission's established findings that increased competition in international markets is beneficial.[6]

3. MFSI is affiliated with MFS Communications Limited (MFSL), a wholly-owned U.K. subsidiary of MFSCC, which has been recently granted a Public Telecommunications Operator (PTO) license.[7] Pursuant to this PTO license, MFSL may construct and operate a domestic digital fiber network for the provision of, *inter alia*, private and dedicated circuits, and engage in international resale of switched services.[8] MFSI argues that, although its affiliate, MFSL, meets the definition of a "foreign carrier" in Section 63.01(r)(1)(ii) of the Commission's Rules, MFSI should be regulated as nondominant in its provision of U.S. international services. In light of the U.K.'s continuing duopoly policy for international facilities-based services and BT's control of 97% of the local access lines,[9] we agree that MFSL does not have sufficient market power or control of bottleneck services or facilities in the United Kingdom to warrant regulation of MFSI as a dominant international carrier on any U.S.-international route for which MFSI has requested authorization as a facilities-based carrier.[10]

4. Upon consideration of MFSI's uncontested application, pursuant to Section 214 of the Communications Act of 1934, as amended, we certify that the present and future public convenience and necessity require the acquisition, on an IRU basis, and operation of capacity in the PTAT-1 cable and the TAT-8, TAT-9, TAT-10, and TAT-11 cables for the provision of the herein authorized services between the United States and each of the following international points: the United Kingdom, Ireland, France, Germany, and the Netherlands and for use of the authorized capacity in transit arrangements for indirect service between the United States and§ each of the United Kingdom, Ireland, France, Germany, the Netherlands, Austria, Belgium, Denmark, Finland, Italy, Norway, Portugal, Spain, Sweden and Switzerland.

5. Accordingly, IT IS HEREBY ORDERED that application File No. I-T-C-94-050 is GRANTED and MFSI is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, and operate a one-half interests in up two DS-3s in the PTAT-1 cable system and one DS-3 in each of the TAT-8, TAT-9, TAT-10, and TAT-11 cable systems to provide direct service between the United States and each of the countries listed in Appendix A.

b. activate capacity in the PTAT-1, TAT-8, TAT-9, TAT-10 and TAT-11 cable systems[11] and in the appropriate and necessary extension facilities for the provision of switched services, private line services, and television relay services between the United States and the international points specified in Appendices A and B;[12] and c. acquire by lease or other comparable means appropriate and necessary extension facilities to link the U.S. cable landing stations with MFSI's technical operations center in Jersey City, New Jersey.

(dated March 31, 1994.)

[6] The Commission has found that the international communications market will support additional service providers and that the added competition will be in the public interest. *See Permissible Services of U.S. Licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization* (INTELSAT), FCC 92-95 (released April 13, 1992). Accordingly, the Commission has authorized new entrants that propose to provide international services, including authorized common carrier services via capacity acquired from submarine cable systems. *See, e.g;. id.; TDX Systems, Inc.*, Mimeo 6609 (released September 2, 1986)' *MCI International, Inc.*, DA 89-1525 (Int'l. Fac. Div., released Dec. 5, 1989); *Sprint Communications Company, LP.*, 8 FCC Rcd. 926 (Int'l. Fac. Div. 1993); *US Sprint Communications Company Limited Partnership*, 4 FCC Rcd. 6279 (Int'l. Fac. Div. 1989).

[7] On September 24, 1993, the U.K. Department of Trade and Industry (DTI) granted MFSL its PTO license.

[8] *See* Application at 12.

[9] We note that British Telecommunications plc (BT) and Mercury Communications Ltd (MCL) are the only two carriers authorized to provide international facilities-based services, in addition to their provision of domestic services. We further note that the United Kingdom has no similar duopoly policy for domestic facilities-based services. For example, in addition to MFSL, DTI granted several other U.S.-owned carriers, such as Sprint, Worldcom and COLT, PTO licenses in the United Kingdom.

[10] In *International Services Order*, 7 FCC Rcd 7331 (1992), *errata*, 8 FCC Rcd 452 (1993), the Commission established a three-part framework for classifying U.S. international carriers with foreign carrier affiliations based on an assessment of the market power of their foreign carrier-affiliates. Carriers that have no affiliation with a foreign carrier in the destination market are presumptively considered nondominant for that route. Carriers affiliated with a foreign carrier that is a monopoly in the destination market are presumptively considered dominant for that route. Carriers affiliated with a foreign carrier that is not a monopoly in the destination market receive closer scrutiny on that route. *Id.* at 7334.

[11] The PTAT cable system extends between landing points at cable stations located at Manasquan, NJ (with interface at Pennsauken, NJ); Brean, UK (with interface point at Bracknelle, UK); Courtmacsherry Bay. *See Private Transatlantic Telecommunications System, Inc.* 4 FCC Rcd. 5077 (Com. Car. Bur. 1989). The TAT-8 cable system extends between landing points at cable stations located at Tuckerton, NJ; Widemouth, UK; Penmarch, France. *See American Telephone and Telegraph Company*, 98 FCC 2d 440 (1984). The TAT-9 cable system extends between landing points at cable stations located at Manahawkin, NJ; Goonhilly, UK, and St. Hilaire, France. *See American Telephone and Telegraph Company*, 4 FCC Rcd. 1129 (Com. Car. Bur. 1988) The TAT-10 cable system extends between landing points at cable stations located at Green Hill, Rhode Island; Norden, Germany; and Alkmaar, the Netherlands. *See American Telephone and Telegraph Company*, 7 FCC Rcd. 445 (1992). The TAT-11 cable system extends between landing points at cable stations located at Manahawkin, NJ, Swansea, UK, St. Hilaire, France. *See American Telephone and telegraph Company*, 7 FCC Rcd. 136 (1992).

[12] We note that should MFSI obtain any interest in facilities beyond the points authorized in the appendices for the provision of common carrier services, including private line services, between the United States and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 50 R.R. 2d 1435 (1986), it would be necessary for MFSI to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

6. IT IS FURTHER ORDERED that MFSI shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that our authorization of MFSI to provide private lines is limited to the provision of such private lines only between the United States and each of those points listed in the appendices -- that is, private lines which originate in the United States and terminate in one of the points listed in the appendices, or which originate in one of the points listed in the appendices and terminate in the United States. In addition, MFSI may not -- and MFSI's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched or interconnected private line services, unless authorized to do so by the Commission upon a country specific finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II First Report and Order, 7 FCC Rcd 559 (1991), *Order on reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 7927 (1992), *petition for reconsideration pending*.

8. IT IS FURTHER ORDERED that MFSI shall file semi-annual reports of circuits additions for TAT-8, TAT-9, TAT-10 and TAT-11 pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. IT IS FURTHER ORDERED that MFSI shall obtain prior authority pursuant to Section 214 of the Communications Act, 47 U.S.C. §214, before adding any circuits or channels of communication for the provision of service over any private cable.

10. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license for the PTAT-1 issued herein under the Act entitled "An Act relating to the landing and operation of submarine cables in the United States," 47 U.S.C. §§ 34-39.

11. IT IS FURTHER ORDERED that neither MFSI nor any persons or companies directly or indirectly controlling it, or under direct or indirect common control with it, or controlled by MFSI shall acquire or enjoy any right, for the purpose of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working agreement to which MFSI or any persons or companies controlling or controlled by MFSI are parties.

12. IT IS FURTHER ORDERED that MFSI shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

13. IT IS FURTHER ORDERED that MFSI shall file with the Commission a copy of any operating agreement it enters into with its foreign correspondents within thirty (30) days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51(a) of our Rules, 47 C.F.R. §43.51.

14. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules 47 C.F.R. §1.106 and 1.115 may be filed within 30 days of the public notice of this Order. (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

APPENDIX A[13]

CABLE SYSTEM	CAPACITY REQUESTED	COUNTRIES TO BE SERVED
PTAT-1	2 DS-3	U.K., Ireland
TAT-8	1 DS-3	U.K., France
TAT-9	1 DS-3	U.K., France
TAT-10	1 DS-3	Germany, Netherlands
TAT-11	1 DS-3	U.K., France

APPENDIX B

COUNTRIES FOR WHICH TRANSITING AUTHORITY IS REQUESTED

Austria
Belgium
Denmark
Finland
Ireland
France
Germany
Italy
Netherlands
Norway
Portugal
Spain
Sweden
Switzerland
United Kingdom

[13] MFSI has stated that the initial utilization of the herein authorized circuits will be 3 E-1 circuits each to the United Kingdom and Ireland on PTAT-1, and 2 E-1 circuits to germany and one E-1 circuit to the Netherlands over the TAT-10 cable. With respect to the capacity requested in the TAT-8, TAT-9, TAT-11 cables, MFSI anticipates initially utilizing 6 E-1 circuits to the United Kingdom and 3 E-1 circuits to France, but is uncertain as to which cables will be utilized for which circuits. *See* Letter from Helen Disenhaus, Esq., Counsel for MFS International, Inc. to Jennifer A. Warren, Esq., Common Carrier Bureau (dated May 6, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of San Jacinto Television Corp., Debtor in Possession, against Telecommunications, Inc. — CSR-4026-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1994; Released: May 18, 1994

By the Chief, Cable Services Bureau:

1. On August 6, 1993, a petition on behalf of San Jacinto Television Corp., Debtor in Possession, licensee of Television Broadcast Station KTFH (Ind., Ch. 49), Conroe, Texas, was filed with the Commission claiming that Telecommunications, Inc., ("TCI"), operator of cable television systems serving Houston (AML), Alvin, League City, Jacinto City (North Shore), La Marque, Baytown, and Three West (Mission Bend), Texas, had declined to carry the stations, even though KTFH is a "local" signal within the meaning of Section 4 of the of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), because KTFH is a commercial broadcast station in the Houston, Texas ADI, where all of the above-listed communities are located. No opposition to this petition has been filed.

2. In support of its petition, KTFH states that by letter dated May 3, 1993, it was informed by TCI that reception of its signal presented potential copyright liability problems in the communities of Alvin, Baytown, Houston, Jacinto City, League City and Three West and potential signal quality and copyright problems in the community of La Marque. KTFH asserts that it was able to resolve the copyright and signal carriage problems through the use of Translator Station K33DB, Houston, Texas, which rebroadcasts KTFH's signal in its entirety, and it subsequently notified TCI by letter dated June 17, 1993, that it was electing "must-carry" status with respect to each of TCI's Houston ADI cable systems. KTFH states that it provided antennas to TCI for installation at each of its headends in order to enhance the reception of KTFH's programming. It argues that although some interference from Television Broadcast Station KTMD (Ind., Ch. 48), Galveston, Texas, was experienced at the Houston headend over K33DB's channel,[1] such interference is minor and can be resolved through the use of a channel converter or a channel 48 blocking filter device.[2] Despite this, KTFH continues, TCI still refuses carriage, claiming that ghosting on the channel reduces the quality of the signal. While KTFH admits that some ghosting exists, it claims that this is minor and no worse than that of other signals presently carried by TCI. Indeed, it argues that, even with ghosting, it is carried on other Houston area cable systems with no problem. Therefore, it maintains, TCI's reliance on this as a basis to refuse KTFH carriage is unjustified.

3. Section 614(h)(1)(b)(iii) of the Communications Act of 1934, as amended, provides the requisite signal levels for VHF and UHF commercial stations at a cable system's headend. For UHF commercial stations, such as KTFH, a standard of -45 dBm has been established. In this instance, however, TCI provides no information or engineering data to the Commission to support its claim of ghosting or to otherwise support its claim of poor signal quality.

4. KTFH's petition establishes that it is entitled to carriage on the Houston (AML), Alvin, League City, Jacinto Cable (North Shore), La Marque, Baytown, and Three West (Mission Bend), Texas cable systems.[3] Accordingly, the petition filed August 6, 1993, by San Jacinto Television Corp., Debtor in Possession IS GRANTED, pursuant to Section 615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended, and Telecommunciations, Inc. IS ORDERED to commence carriage of KTFH forty-five (45) days from the release date of this *Order*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated pursuant to §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] Declaration of Robert W. Fisher, of TCI, August 6, 1993.

[2] The interference problems on the Houston system were resolved in early July, while the problems with respect to Jacinto City, Three West and Baytown were resolved in mid-July.

[3] However, KTFH would be liable for any copyright fees engendered by its carriage on TCI's system, should such liability be found to exist.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Rural California Broadcasting Corporation against Americable International	CSR-3878-M CA1293

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1994; Released: May 19, 1994

By the Chief, Cable Services Bureau:

1. On November 24, 1993, a petition for reconsideration was filed, on behalf of Americable International, Inc. ("Americable"), operator of a cable system serving Mare Island, California. Americable requests that the Commission reconsider its October 12, 1993, action[1] ordering the Mare Island system to carry Station KRCB-TV (Educ., Ch. 22), Cotati, California. A petition to deny this petition was filed December 2, 1993, on behalf of KRCB-TV.

2. In support of its request, Americable states that it never received a notice requesting carriage from KRCB-TV nor was it served with a copy of the complaint filed with the Commission. Indeed, it maintains that its first knowledge of KRCB-TV's request was when it was served a copy of the Order adopted on October 12, 1993. Since KRCB-TV did not fulfill the requirements of §76.56(a)(1) of the Commission's Rules in formally requesting carriage, Americable argues that it had no opportunity to respond on its own behalf. Further, Americable avers that KRCB-TV fails to deliver a good quality signal to its system's principal headend. Americable concludes, therefore, that it is not required to add KRCB-TV to its Mare Island system.

3. In its petition to deny, KRCB-TV submits a copy of its letter requesting carriage on Americable's Mare Island system, as well as a certified mail receipt indicating that it was received at the system's headquarters. KRCB-TV contends, therefore, that its right to carriage on the Mare Island system has been established. In addition, KRCB-TV maintains, not only is Americable's allegation of poor signal quality unsubstantiated, it is also overdue. As it believes that its signal is receivable at the system's headend, KRCB-TV requests that the Commission again order Americable to carry its station.

4. We are not persuaded by the arguments raised by Americable. KRCB-TV has adequately shown that it formally requested carriage on the Mare Island system by letter dated November 11, 1992. Further, our records indicate that Americable was served a copy of KRCB-TV's must carry complaint on July 1, 1993. Therefore, there is every indication that Americable was adequately aware of KRCB-TV's request.

5. With regard to the issue of poor signal quality raised by Americable, §615(g)(4) of the Communications Act of 1934, as amended, states that "a cable operator shall not be required to carry the signal of any qualified local noncommercial educational television station which does not deliver to the cable system's principal headend a signal of good quality or a baseband video signal, as may be defined by the Commission." 47 U.S.C. 535(g)(4). Because the cable operator is in the best position to know whether a given NCE station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

6. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether a VHF or UHF noncommercial station places an adequate signal level over a cable system's principal headend.

7. In this instance, Americable has failed to provide any engineering data to corroborate its claim of poor signal quality from KRCB-TV at its principal headend. Cable systems are required to follow generally acceptable engineering practices in making such a determination. To determine whether a certain level of signal is present, it is necessary to submit a series of measurements. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results.[2]

8. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above

[1] *Rural California Broadcasting Corporation against Americable International*, 8 FCC Rcd 7600 (1993).

[2] For VHF TV stations, if the test results are less than -55 dBm, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, we believe that the readings should be taken over a 24-hour period, with measurements no more than 4 hours apart to establish reliable test results.

ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests were done. When measured against these criteria, we cannot conclude that KRCB-TV does not provide a good quality signal at Americable's Mare Island principal headend.

9. In light of the above, therefore, pursuant to §§0.321 and 1.106 of the Commission's Rules, the petition for reconsideration, filed November 24, 1993, on behalf of Americable International, IS DENIED and Americable IS ORDERED to commence carriage of Station KRCB-TV within forty-five (45) days of the release date of this order unless it submits the engineering data required herein within fifteen (15) days to support its assertion of poor signal quality from KRCB-TV at Americable's principal headend.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS Communications, Inc.
(formerly Advanced Telecommunications
Corporation)
Complainant,

v.

Southern Bell Telephone and Telegraph Co. File No. E-91-39

and

South Central Bell Telephone Co. File No. E-91-40
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

ORDER

Adopted: May 9, 1994; Released: May 19, 1994

By the Chief, Formal Complaints and Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On January 22, 1991, Advanced Telecommunications Corporation[1] (LDDS) filed the above-captioned formal complaints against Southern Bell Telephone and Telegraph Co. and South Central Bell Telephone Co.[2] (BellSouth). The complaint sought monetary damages resulting from an alleged improper calculation of the percentage of interstate use (PIU) rates charged by BellSouth to LDDS. On May 5, 1994, however, LDDS and BellSouth filed a joint motion to dismiss the complaint with prejudice stating that a mutually agreeable general release had been signed by both parties settling all pending controversies, with details to be worked out later.

2. We are satisfied that granting the parties' motion to dismiss the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules; 47 C.F.R. § 0.291, that the parties' Joint Motion to Dismiss IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

[1] Advanced Telecommunications Corporation was the predecessor corporation to LDDS Communications, Inc. and will be referred to as "LDDS". The complaint was amended to reflect the merger of these companies in December 1992.

[2] BellSouth is the successor corporation to both Southern Bell Telephone and Telegraph Co. and South Central Bell Telephone Company.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ernest M. DeFazio — NAL/Acct. No. 315LA0101
Port Hueneme, California

ORDER

Adopted: May 3, 1994; **Released: May 19, 1994**

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. Mr. Ernest M. DeFazio filed a Petition for Reconsideration, requesting reconsideration of the monetary forfeiture of $5,000 issued pursuant to Section 503, 47 U.S.C. § 503, for violation of Section 386(a), 47 U.S.C. § 386(a), of the Communications Act of 1934, as amended (the Act), and Section 80.903, 47 C.F.R. § 80.903, of the Commission's Rules. For the reasons noted below, the Bureau affirms the monetary forfeiture.

II. BACKGROUND

2. On September 13, 1993, the Los Angeles Office issued a Notice of Apparent Liability (NAL) to Mr. DeFazio. The penalty was imposed for sailing without a valid Communications Act Safety Radiotelephone Certificate. Based on the response from Mr. DeFazio, the Los Angeles Office issued a Notice of Forfeiture (NOF) for $5,000 on October 13, 1993. Mr. DeFazio now appeals. The petitioner contends that his action did not endanger the public or disrupt the communications frequencies; that the lack of a valid certificate was determined only after he requested the inspection; that his radio equipment was found to be in compliance with Commission Rules; that he has a history of past compliance; that he must have had a valid certificate on January 27, 1984, if his previous certificate expired on January 27, 1986, since the certificates were issued for five year periods; and that the forfeiture would be an undue financial burden for him.

III. DISCUSSION AND CONCLUSION

3. The arguments raised in the Petition for Reconsideration have been thoroughly considered and are incorporated herein by reference. Upon review of the arguments raised in the petition as well as review of the NAL and NOF, we find that the petitioner fails to present any new arguments or evidence that was not previously addressed. An inspection of Mr. DeFazio's vessel on January 27, 1984, revealed that he did not have a valid Communications Act Radiotelephony (Safety) Certificate. At that time Mr. DeFazio was issued a warning for operating without a valid Safety Certificate, and upon completion of the inspection, was issued a Safety Certificate valid until January 27, 1986. At that time, the Commission issued Safety Certificates for two year periods. Mr. DeFazio sailed from January 27, 1986, to July 1, 1993, in violation of the Communications Act and the Commission's Rules. His violation was repeated. Furthermore, although the petitioner claims inability to pay the forfeiture, no documentation, such as tax returns or financial statements that were requested in the Notice of Apparent Liability, were submitted to support his claim. Accordingly, the forfeiture amount is affirmed.

IV. ORDERING CLAUSES

4. IT IS ORDERED THAT, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.106 of the Rules, 47 C.F.R. § 1.106, the petition for reconsideration is DENIED.

5. IT IS FURTHER ORDERED pursuant to Section 1.80 of the rules, 47 C.F.R. § 1.80, that Mr. DeFazio must pay the forfeiture amount of Five Thousand Dollars ($5,000) within thirty (30) days of receipt of this Order. Payment may be made by check or money order payable to the Federal Communications Commission.[1] Please place NAL/Acct. No. 315LA0101 on the remittance and mail it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

6. IT IS FURTHER ORDERED that a copy of this Order shall be sent to Mr. DeFazio and counsel.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[1] Requests for installment plans should be mailed to: Chief, Billings and Collections, Mail Stop 1110A2, 1919 M Street, N.W., Washington, D.C. 20554. Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 9, 1994

Released: May 9, 1994

1800C3-M
93110635
92110562
92040143

CERTIFIED MAIL -- RETURN RECEIPT REQUESTED

Jack M. Mortenson
Mortenson Broadcasting Company
Licensee of WBGR(AM), Baltimore, MD
333 W. Vine St., Suite 200
Lexington, KY 40507

Dear Mr. Mortenson:

This letter constitutes a Notice of Apparent Liability (NAL) for a forfeiture of $12,500 issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (47 U.S.C. Section 503(b)), for your willful and repeated violations of Section 315(b) of the Communications Act (47 U.S.C. Section 315(b)), as implemented by Section 73.1940(b)(1) of the Commission's rules (47 C.F.R. Section 73.1940(b)(1)).[1]

BACKGROUND

This action results from an anonymous complaint and subsequent Commission investigation into the political programming practices of WBGR(AM). During the investigation we asked you to respond to two letters of inquiry.[2] In the first, we asked questions regarding your sales practices and your methods for calculating lowest unit charge (LUC). We requested that you supply both your political file and commercial invoices in effect during the election period preceding the September 12, 1991, local primary. Your April 3, 1992, response stated that, upon review of the pre-election political accounts, you found that several candidates had outstanding credit balances and that you were issuing appropriate refunds. Apparently, these candidates had prepaid for some ordered spots that did not air. In your November 16, 1992, supplement to your initial response, you explained that you also had failed to compute agency commissions into LUC, that this resulted in additional overcharges to a number of candidates who did not use agencies, and that you were making the appropriate rebates.

In reviewing your responses and the other information you provided, we found various additional rate discrepancies and sent you a second letter of inquiry. We asked, *inter alia*, about bonus spots that were provided to several commercial advertisers and apparently not calculated into LUC. We also noted that our calculations resulted in lower LUC's than you had computed for several time periods. In addition, we asked why some political advertisers were given PSA's, billboards, and/or print advertisements while others were not. Finally, we requested information concerning whether you complied with the Commission's sponsorship identification requirement with respect to the billboards and ten-second spots aired on behalf of political candidates.

You responded by letter dated November 24, 1993. You acknowledge that the Commission identified additional overcharges you had not previously discovered in your review of the invoices. You state that there was no definitive policy regarding PSA's, billboards, or print advertisements aired or placed in conjunction with the purchase of time in 1991, and, therefore, the station has no way to determine on what basis these sales arrangements were offered to candidates. You assert that the correct sponsorship identification was aired on all political programming.

As a general matter, you state that the errors resulting in overcharges were not intentional, but resulted instead from the carelessness of local station management and its sales staff, most of whom are no longer employed by the station. You further assert that it is important to you that no political candidate was overcharged and that all candidates were treated fairly and billed equally under the law. As a result, you explain, WBGR is "reimbursing all funds paid by every candidate for advertising on WBGR in this election."[3]

DISCUSSION

Section 315(b) of the Communications Act requires broadcasters to charge legally qualified candidates for public office the lowest unit charge of the station for the same class and length of time in the same time period during the 45 days preceding a primary election and the 60 days preceding a general or special election.[4] It appears that WBGR charged various candidates more than the LUC of the station for the same class of time in the same time period during the 45 days prior to the September 12, 1991, local primary election.

You have admitted that you overcharged candidates by failing to calculate into LUC commissions paid to advertising agencies.[5] Specifically, if a station allows advertising agency commissions to be taken out of the charges made for time, and a candidate purchases time through an agen-

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[1] In *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992), the Commission revised and renumbered the various provisions of Section 73.1940 of the Commission's rules. The rules relevant to this forfeiture may now be found at Section 73.1942 (candidate rates).

[2] The Commission sent a letter of inquiry on February 28, 1992. You responded on April 3, 1992, and filed a supplement to that response on November 16, 1992. An additional inquiry letter was sent by the Commission on October 20, 1993. You responded to it on November 24, 1993.

[3] Because you state that you are "reimbursing all funds" received from candidates during the pre-election period, we do not find it necessary to order a rebate of the exact amount of the overcharges that are the subject of this NAL.

[4] 47 U.S.C. Section 315(b).

[5] *See, The Law of Political Broadcasting and Cablecasting*, 100 FCC 2d 1476, 1516 (1984).

cy, the station may include the usual agency commission in the LUC it makes to the candidate. However, if the candidate buys time directly from the station, the amount usually paid for agency commission must be deducted from the LUC. Because WBGR failed to make this adjustment, candidates purchasing directly from the station were overcharged because they paid an agency commission of 15% even though they did not use an agency.

You also apparently failed to include bonus spots in determining LUC. Stations must calculate bonus spots into LUC.[6] The station apparently afforded bonus spots to various commercial and political advertisers without including those bonus spots in its LUC calculations, in violation of the LUC statute and rules.

We are concerned that you are unable to account for the provision of PSA's, billboards, and print advertisements to some, but not all, political advertisers. This raises questions as to whether WBGR discriminated between the candidates.[7] Although we are not making any finding in this connection, we expect that in the future the station will establish, and follow, non-discriminatory standards for offering such time.[8]

FORFEITURE

Accordingly, pursuant to Section 503(b) of the Communications Act, you are hereby advised of your apparent liability for a forfeiture of twelve thousand five hundred dollars ($12,500) for your apparent willful and repeated violations of 47 U.S.C. Section 315(b) and 47 C.F.R. Section 73.1940(b)(1), as a consequence of your failure to charge candidates no more than the lowest unit charge of the station for the same class and length of time in the same time period during the 45 days prior to the September 12, 1991, election. The amount specified was reached after consideration of the factors set forth in the *Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), which establish a $12,500 base amount for LUC violations.

You are also directed to submit to the Commission within thirty (30) days of your receipt of this letter, a report specifying the refunds made to each of the candidates who purchased time during the relevant 1991 pre-election period.

With respect to the forfeiture imposed herein, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's rules are summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart, Chief
Mass Media Bureau

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[6] *Id.* at 1517.

[7] 47 C.F.R. Section 73.1940(c). This rule can now be found at Section 73.1941(c).

[8] Regarding sponsorship identification, we have insufficient evidence before us to contradict your assertion that all political announcements, including billboards, contained the appropriate sponsorship identification.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

ROCHESTER TELEPHONE CORPORATION — File No. W-P-C-6867

To construct, operate, own and maintain facilities to conduct a market test of video dialtone service in a defined area in Rochester, New York.

ORDER AND AUTHORIZATION

Adopted: March 25, 1994; Released: March 25, 1994

By the Chief, Domestic Facilities Division:

1. Rochester Telephone Corporation (Applicant or Rochester) filed the above-captioned application pursuant to Section 214(a) of the Communications Act of 1934, 47 U.S.C. § 214(a), and Section 63.01 of the Commission's rules, 47 C.F.R. § 63.01, seeking Commission authority to construct, operate, own and maintain facilities to conduct a tariffed six-months market and technical field test of video dialtone service in a defined area in Rochester, New York (Field Test). Subsequent to the filing of the above-captioned application Rochester filed an amended application. No oppositions or comments were received in response to the Commission's public notice of the initial filing or the amended application.

THE APPLICATION

2. Rochester states in its amended application that it seeks authority to conduct a tariffed Field Test to evaluate two technologies: (a) a fiber optic and coaxial cable system that will be deployed to serve up to 100 subscribers, consisting of a combination of multi-unit and single unit dwellings (Fiber-Coax System); and (b) an Asymmetric Digital Subscriber Line (ADSL) system utilizing Discrete Multi-Tone technology that will use existing copper loop plant to serve up to 20 single unit dwellings located within one to two miles of Rochester's Field Street central office (ADSL System).

3. According to Rochester, the ADSL facilities will be employed to test the use of ADSL technology to provide video dialtone service over existing copper loops. The trial will require the installation of new equipment at the central office and the subscribers' premises to enhance the capability of the embedded plant. Rochester submits that the facilities for the ADSL System will not extend communications service into any territory not currently served by Rochester. Applicant explains that the central office ADSL equipment will be installed in its Field Street central office, the same office in which the facilities associated with the Fiber-Coax System will be placed. Equipment at the subscriber premises will be provided by the Programmer-Customers.

4. Applicant explains that the proposed Fiber-Coax System will utilize 12 fibers from an existing 40-fiber cable that runs from the Field Street central office to one or two multi-unit dwellings located approximately one mile from the neighborhood that it originally contemplated serving, together with selected single unit dwellings in an adjacent neighborhood. Rochester says that the existing cable facility is currently spare and will be dedicated, for the duration of the Field Test, to the provision of video dialtone service. Applicant asserts that from this existing run, it will splice and run additional fiber facilities to one or more optical nodes. Coaxial cable will provide the final link to the end users' premises explains Rochester.

5. Applicant states its Fiber-Coax System will be capable of handling up to 350 video-on-demand channels per system.[1] Rochester says it intends to use two transmission systems to serve each of the 100 subscribers. Thus, there will be 700 potential video-on-demand channels available to each end-user. Applicant contends that its Field Test will accommodate multiple Programmer-Customers on the same non-discriminatory basis as originally proposed and it will accept requests from Programmer-Customers for video dialtone service on a first-come, first-served basis, subject to the capacity limitation of its facilities. Applicant has entered an agreement to provide one programmer, USA Video, with up to 150 channels of the 700 channels available.

6. Rochester points out that it will maintain the combiner/decombiner and host digital terminal equipment in the central office as well as the fiber optic and coaxial cable facilities linking the central office to a customer's premises. Programmer-Customers, according to Applicant, will maintain their own video servers as well as the customer premises equipment needed to terminate the signal from the coaxial cable. Rochester submits that the network facilities and equipment that will be used in the ADSL System include both the ADSL central office units and ADSL remote units, which are mounted at points where a customer's telephone cable enters the dwelling.

7. Applicant explains that the proposed ADSL System is designed to permit the transmission of a downstream 6 Mbps digital data signal that is capable of delivering compressed video programming over existing subscriber loops. ADSL technology permits this video signal to be transmitted together with voice and data telephone service over the same loop, states Rochester. In addition, notes Applicant, the proposed ADSL system will allow the transmission of an upstream 16 Kbps data signal that can be used for interactive services. Applicant relates that the proposed ADSL system will be capable of delivering movies-on-demand and other inter-active services such as video games, home shopping, and educational and health care services that programmers may wish to offer. Rochester submits that because the current ADSL technology is capable of delivering only one retransmitted broadcast signal to a customer, it does not expect such programming to be offered on the ADSL System during the trial.

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[1] A "system" refers to one fiber optic cable interconnected with the Host Digital Terminal in the central office. End users will be connected to 2 systems on the fiber/coax equipment and will be able to access the 700 potential video on demand channels.

8. Rochester anticipates that the ADSL System will be able to accommodate up to a maximum of 20 end-user customers. Applicant points out that the actual number of participants will depend on the number of ADSL units furnished by the manufacturer and the number of subscribers who volunteer to participate in the trial. Rochester says it will not own or operate a video server in connection with the ADSL System and will provide space in its Field Street central office, on a non-discriminatory basis, for Programmer-Customers to install their servers to transport video-on-demand on the ADSL lines during the six month trial. Applicant states that the office has sufficient capacity for several video servers. Rochester contends that Programmer-Customers will also furnish and install the video customer premises equipment that these subscribers need to terminate the ADSL video signal. Applicant explains that although more than one Programmer-Customer will be able to access the ADSL System, end users participating in the six month Field Test will be able to select only one Programmer-Customer at a time from the available service providers. The end-user will be able to change the selected programmer on the one channel by contacting Rochester, a step that is not necessary in the Fiber-Coax System. Nevertheless, even though it may be on a delayed basis, each end-user will have access to all of the programmers participating in the ADSL System.

9. Rochester states that both the Fiber-Coax and the ADSL Systems will serve the public interest, convenience and necessity. According to Applicant, the ADSL System will test an evolving technology that is capable of transmitting a compressed digital video signal over its embedded copper loop plant and it will enable it to offer video dialtone service to consumers located in areas where fiber optic and coaxial cable facilities have not been deployed. Rochester contends that together the services will provide subscribers with access to video-on-demand entertainment services as well as interactive educational and other services. Applicant alleges that the value of the foregoing information justifies the limited expenditure required for its trial.

10. Applicant submits it will account separately for all incremental investment and expenses incurred in connection with both the Fiber-Coax and the ADSL System, in accordance with Parts 32 and 64 of the Commission's rules, 47 C.F.R. §§ 32.2006; 64.702 *et. seq.* Rochester declares that these costs will be excluded from the regulated rate base and recovered from future services that may be offered utilizing the Fiber-Coax and ADSL technologies. Applicant points out that in the event that these costs are not recovered from such future services, they will be assumed by its shareholders, not its ratepayers and records of ADSL expenses and investment will be kept in sufficient detail to demonstrate compliance. Rochester states that it currently does not plan to offer enhanced services over either the Fiber-Coax or ADSL System. If it were to do so, explains Applicant, it would file appropriate amendments to its Cost Allocation Manual prior to offering such services.

11. Rochester submits that consistent with the Commission's ruling in an order authorizing an ADSL video dialtone test, it will not allocate any of the embedded costs of the local loop plant to the Field Test.[2] Applicant says that it will, however, examine possible methods for monitoring the relative use of the local loop for video dialtone and telephone services during the Field Test. Rochester stipulates that within ninety (90) days after the end of the Field Test, it will prepare and file with the Commission a report concerning the results of the Field Test.

DISCUSSION

12. The critical elements of video dialtone are that there be: (1) a common carrier platform available to multiple video programmers on a nondiscriminatory basis, and, (2) a means by which customers can access any and all of the video programming. The platform must also provide "sufficient capacity to serve multiple video programmers."[3] Pursuant to these principles, the Commission has approved four applications for video dialtone trials.[4]

13. Rochester proposes to test two architectures in its trial. One architecture is for a 700-channel multi-programmer video service that allows up to 100 end-users to select any or all of the programmers. This proposal constitutes a video dialtone platform available to multiple video programmers on a non-discriminatory basis. Rochester states that 150 channels of this capacity would be set aside for one programmer, USA Video. Pre-launch allocations are not inherently inimical to the principles of common carrier nondiscrimination, so long as the remaining capacity is sufficient "to serve multiple video programmers."[5] In this case, the remaining 550 channels appear to provide sufficient capacity for other programmers during this six month market trial. We caution Applicant that the issue of sufficient channel capacity may be revisited in the event of any request to expand or extend this trial.

14. The second architecture proposed by Rochester is for a multiprogrammer, one-channel ADSL transmission system for testing stored programming over copper wire to up to 20 subscriber customers. Because of restrictions inherent to the trial, each of the 20 subscribers can access only one programmer at a time. End-users can switch programmers by contacting Rochester. While this step is more cumbersome than in the Fiber-Coax System, in which subscribers can select alternate programmers instantly, end-users in the ADSL System can access any and all of the programming available. Since the ADSL System can accommodate multiple programmers, and capacity does not appear to be limited, the ADSL System satisfies the basic elements of video dialtone service. The ADSL System has the advantage of testing the use of existing facilities, such as copper

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[2] *See* Chesapeake and Potomac Telephone Co. of Virginia, *Order and Authorization* 8 FCC Rcd 2313, Paras. 13-14 (March 25, 1993) (*C&P of Virginia*).

[3] *See* Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781 (1992), (VDT Order) *pets. for recon. pending, appeal pending sub nom., Mankato Citizens Telephone Company, et al. v. FCC*, No. 92-1404 *et al.*, (D.C. Cir. Sept. 9, 1992) at Para 290.

[4] *C&P of Virginia; New York Telephone*, 8 FCC Rcd 4325 (1993); *Southern New England Telephone*, FCC 93-743 (released November 12, 1993); and *U S West Communications, Inc.*, 9 FCC Rcd 184 (1993).

[5] *VDT Order* at Para 29. See also *New York Telephone* at Para 5.

wiring, for the purposes of video dialtone.[6] This issue also may be revisited should applicant seek to expand or extend the test.

15. Rochester has fulfilled the requirements for a §214 authorization. Existing facilities are insufficient for the purposes of the trial, the additional investment therefore is necessary, and the public interest, convenience and necessity will be served by the potential benefits to be gained from the trial.[7] We will attach conditions on this authorization similar to those imposed on other authorizations.

16. Accordingly, **IT IS ORDERED**, that, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the application of Rochester Telephone Corporation (File No. W-P-C-6867) **IS GRANTED**, and the applicant is authorized to initiate a video dialtone trial in its Rochester, New York service area for a period of six months from the date service is available to end users.

17. **IT IS FURTHER ORDERED**, that grant of the application for both the Fiber-Coax and the ADSL trials proposed herein **IS SUBJECT TO** the following **CONDITIONS:**

a) That no costs associated with the construction, operation or use of the video dialtone trial shall appear in any Rochester telephony rate base or as a regulated expense without prior authorization from this Commission.

b) That prior to providing any enhanced services, Rochester will file any necessary revisions to its Cost Allocation Manual (CAM).

c) That the trial period be limited to a period of up to six months.

d) That Rochester will not involve itself in decisions concerning the presentation of video programming to end-users absent prior Commission approval.

e) That Rochester provide all video programmers access to the basic platforms under the same terms and conditions and undertake all reasonable steps to expand capacity as necessary to meet demand.

f) That Rochester must report to the Chief, Domestic Services Branch, Common Carrier Bureau, within five days of denying any video programmer access to the platform due to capacity limitations, in whole or in part, and on the steps taken to expand the capacity of the platform to accommodate demand.

g) That Rochester will submit to the Chief, Domestic Services Branch, Common Carrier Bureau, within three months after completion of the trial a written report. The report must, among other things;

1) include a statement from each video programmer or other service provider using Rochester's services stating whether that programmer/service provider believes it has been discriminated against by Rochester in any manner;

2) identify the capacity allocated to each video programmer customer and the identity of the programmer-customer;

3) describe the video dialtone technology used during the trial. Rochester must include information on the video switch and other components of the video dialtone system, the operation of video-on-demand, the quality of the voice, data and video, the methods of accessing the platform, the digital technology incorporated into the network and its impact on capacity, details on the percentage of use of the local loop for video and telephone services, and the frequency with which subscribers to the ADSL test switch programmers by contacting Rochester;

4) to the extent known, evaluate the market for video dialtone service, including consumer interest in on-demand video services and consumer willingness to pay for service;

5) detail the costs Rochester has incurred for the trial, broken down into subsidiary accounting records; separate subsidiary records should be kept for all incremental costs associated with video dialtone;[8] however, these records should not include allocations of administrative overheads that are not directly attributable to video dialtone; and,

6) include any published commentary of which Rochester is aware regarding the trial.

18. This Order is issued under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, and is effective upon its release. Failure of Rochester Telephone Corporation to decline the authorization as conditioned within thirty-one (31) days from the release date will be construed as formal acceptance.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[6] "The Commission has a mandate... to encourage technological innovation... and to expedite the introduction of new technology subject to other public interest considerations." *C&P Telephone* at Para 9.

[7] 47 C.F.R. § 63.01.

[8] If, in the provision of video dialtone, facilities are added which are also used by telephony service, the total cost of said facilities should be recorded in subsidiary accounts.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VIA USA, LTD — File Nos. I-T-C-93-031
TELEGROUP, INC. — I-T-C-93-050

Applications for Authority Under
Section 214 of the Communications
Act of 1934, as amended, to operate
as International Resale Carriers

DISCOUNT CALL — File No. I-T-C-93-054
INTERNATIONAL CO.

Application for Authority Under
Section 214 of the Communications
Act, as amended

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 12, 1994; Released: May 11, 1994

By the Commission:

INTRODUCTION

1. The three above-captioned applications filed pursuant to Section 214 of the Communications Act of 1934, as amended, (the Act) request authority to resell the public switched services of various carriers.[1] The applications raise the issue of whether we should authorize a carrier to offer a resold service that uses an uncompleted call signalling configuration. We grant the applications to resell the public switched services of other U.S. carriers, and we deny AT&T's petition to deny the applications.

BACKGROUND

2. Viatel is a Colorado corporation that seeks authority to offer resold, tariffed international switched voice and facsimile service between the United States and various international points.[2] Telegroup, Inc. (Telegroup), an Iowa corporation, seeks authority to offer resold international switched voice and data service between the United States and various international points. Discount Call International Company (DCI), a Florida corporation, seeks authority to operate a "typical telephone dialback operation" between points in the United States and various South American and Central American countries.

3. AT&T has petitioned to deny each application, alleging that the applicants intend to engage in a "call turn-around" or "call-back" service. Call-back service allows a customer in a foreign country to use foreign facilities to dial a telephone number in the United States and receive dial tone at a switch at the reseller's U.S. location, which the customer can then use to place a call via an outbound switched service of a U.S. carrier. The through calls are billed at U.S.-tariffed rates.[3] AT&T has opposed the applications to the extent that the applicants propose to use the resold services to provide call-back services using a "code-calling" configuration. AT&T states that a reseller using "code-calling" instructs its customers in foreign locations to dial a U.S. telephone number, hang up after a pre-arranged number of rings but before the call is completed, and wait for the reseller (usually through a conferencing unit) to return a call to the predesignated foreign telephone number, providing U.S. dial tone to the foreign customer.[4] The connection between the calling and the called party is established via a U.S.-outbound switched service to the called location. The customer does not pay the foreign carrier for the initial uncompleted call.[5]

4. According to AT&T, "code-calling" constitutes an unreasonable practice under Section 201 of the Communications Act and may constitute wire fraud, since the applicant uses the facilities of a U.S. and a foreign carrier to transport the uncompleted call, with the deliberate intent of avoiding paying for the service provided or the use of the facilities. AT&T claims generally that this activity imposes costs on the transport carrier which the carrier will not recover from the cost causer, and precludes the transport carrier from using the facilities employed by the applicant's customers to generate revenue-producing minutes. AT&T concludes that the transport carrier's customers will bear the expense of these costs in the rates they

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[1] We placed the application of VIA USA (Viatel) on public notice on November 25, 1992, and the other two applications on December 23, 1992. AT&T has opposed all three applications. In addition, various parties submitted comments, including USA Link Limited Partnership (USA Link), International Discount Telecommunications Corp. (IDT), Telecommunications Resellers Association (TRA), Executive Telecard, Ltd (EXTL), and the Association of Telecommunications Enterprises of the five Andean Countries (ASETA).

[2] Viatel also states that it will offer an enhanced service using the resold services. Of course, pursuant to *Computer II*, Viatel need not seek authority to provide such enhanced services. *See Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 FCC 2d 384 (1980) (*Computer II*). Thus, the authority we grant herein applies only to basic switched services.

[3] The customer may have to pay the foreign service provider for the initial connection. *See infra* note 5.

[4] AT&T cites to a letter from Viatel's agent in Japan, to Telegroup advertising material, and to portions of DCI's application as evidence that each applicant intends to encourage its customers to engage in "code-calling."

[5] We refer to this practice as "uncompleted call signalling." An overseas caller may establish U.S. dial tone through a call-back configuration using at least two methods other than uncompleted call signalling: a) *Direct Calling* (Use of the foreign carrier's phone lines to establish an initial connection with a conferencing unit, which then redials the calling party's phone number. The caller thus must pay the foreign carrier for the initial call); or b) *I-800 Calling* (Use of a U.S. carrier's International 800 service (I-800) to establish an initial connection with a conferencing unit, which then patches the call through to the termination point. The caller pays the call-back provider, who pays the U.S. carrier for the I-800 service, as well as for the second call).

will pay for other services. AT&T also contends that authorization of code-calling by the Commission would be inconsistent with principles of international comity.[6] AT&T states that foreign administrations have complained that code calling not only violates their national laws, but also the International Telecommunication Regulations (*International Regulations*).[7] AT&T asserts that grant of the applications is therefore not in the public interest. It requests denial of each application in its entirety, but asks in the alternative for the Commission to condition any license to prohibit "code-calling."

5. In response, each of the applicants acknowledges that it offers the resold services as part of a call-back service that employs an uncompleted call signalling configuration for some calls, but denies that such activity constitutes a violation of Section 201 of the Act.[8] Telegroup states that, as a reseller, it is incapable of engaging in acts which contravene the "just and reasonable" standard of Section 201.[9] The applicants assert that since AT&T and its foreign correspondents do not charge for uncompleted calls and do not prohibit uncompleted call signalling in their tariffs, uncompleted call signalling cannot constitute an unreasonable practice.[10] According to the applicants, the carriers can charge for such calls if they want.[11] Applicants further contend that uncompleted phone calls are often used, reasonably and legally, to signal the other end, and they suggest that prohibiting uncompleted call signalling would require the FCC to outlaw many otherwise innocent activities.[12]

6. The applicants also state that AT&T's claimed cost from this practice is overstated. Applicants note that uncompleted call signalling generates additional revenue for AT&T, since the discounts provided by call-back operators generate outbound calls over AT&T's lines that may otherwise not occur.[13] Telegroup and Viatel assert that AT&T is adequately compensated through the international settlements process. Applicants argue that the activity is consistent with the Commission's policy goals of increasing competition through unlimited resale and reducing foreign collection rates, thus increasing demand and the overall efficiency of the global switched network.[14]

7. In response to AT&T's argument regarding international comity, Telegroup notes that AT&T has provided no evidence of foreign court decisions specifically holding uncompleted call signalling unlawful.[15] Telegroup also states that some countries have held uncompleted call signalling to be lawful.[16] Finally, Telegroup asserts that "[i]t is not within the jurisdiction of the Commission to construe and enforce the laws of other sovereign states," and that "it is the responsibility of the appropriate governmental authorities in those countries to interpret and enforce those legal requirements."[17]

8. In support of AT&T's petition, EXTL, a Section 214 licensee which also installs equipment in foreign networks, states that many countries are improving their networks utilizing U.S. equipment and services, and that such improvements are in the U.S. interest in that they lead to a more efficient worldwide telephone system. EXTL states that foreign carriers need the higher collection rates, including taxes, in order to pay for such improvements to

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[6] *See* Letter, dated December 23, 1993, from Judy Arenstein, Director, Federal Government Affairs, AT&T, to Kathleen B. Levitz, Chief, Common Carrier Bureau, FCC (*AT&T Ex Parte*). Telegroup argues that the *AT&T Ex Parte* was procedurally defective because AT&T failed to caption the letter as an "Ex Parte" presentation, as required by Section 1.1206(a)(1) of the Commission's rules. *See* Letter, dated April 7, 1994, from Mitchell F. Brecher, on behalf of International Telcom, Ltd., d/b/a Kallback, Telegroup, Inc. and Telenational Communications Limited Partnership, to the Honorable Reed Hundt, Chairman, Federal Communications Commission (*Brecher Letter*), at 1-2. We note that the *AT&T Ex Parte* was available for public inspection in each of the above-captioned proceedings, and all parties had an opportunity to respond. *See* Section 1.1206(a)(4), note 1. Moreover, given that Telegroup in fact responded, we do not believe that Telegroup, or any of the applicants, was prejudiced by any violation of our rules. Therefore, we accept all filings for the record.

[7] *AT&T Ex Parte*, at 2. The *International Regulations* are issued under the International Telecommunication Union (ITU) Convention, and have the status of a treaty. The ITU Convention and the Regulations issued under it apply to government-owned telephone administrations and Recognized Private Operating Agencies (RPOAs). Administrations and RPOAs are defined in the ITU Convention at Annex 2. The U.S. government is obligated to adhere to the Convention and, in turn, ensures that all U.S. common carriers act in accordance with the Convention. *See International Communications Policies Governing Designation of Recognized Private Operating Agencies, Grants of IRUs in International Facilities and Assignment of Data Network Identification Codes*, 104 FCC 2d 208, 216 n.26 (1986) (*RPOA Order*); ITU Convention, Article 44.

[8] According to Viatel, a customer can call Viatel's switching center in Omaha, Nebraska, hang up before the call is answered, and wait for a return call that will provide the customer with a U.S. line. *See* Declaration of Martin Varsavsky, President of Viatel. Viatel states that uncompleted call signalling is not a significant part of its business, but that it is "the only economically practicable tool that Viatel can use to serve its clients" when it is unable to use international toll free lines. *See* Viatel Ex Parte Comments at 2.

[9] *Citing Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization*, First Report and Order, 85 FCC 2d 1, 29, 31 (1980) (*Competitive Carrier*).

[10] AT&T asserts that the business decision not to charge for attempting to complete a call was never intended to apply to "the wholesale avoidance of applicable charges by another telecommunications carrier as part of its provision of common carrier telecommunications services." AT&T's Reply to Viatel's Opposition to AT&T's Petition to Deny, at 4.

[11] TRA states that AT&T can easily implement a service that would allow it to recover costs for unanswered calls. *See* TRA Comments at 1. USA Link argues that since AT&T would receive compensation for its facilities if it changed its tariff, AT&T has "no legitimate basis" for arguing that uncompleted call signalling violates Section 201 of the Act. *See* USA Link Comments at 2.

[12] Applicants state that AT&T also encourages uncompleted call signalling over carrier networks. *See, e.g., Brecher Letter*, at 6.

[13] AT&T responds that under proportionate return, the carrier allocated the U.S.-inbound traffic is not necessarily the carrier that will handle the U.S.-outbound traffic generated by a call-back service. AT&T states further that it does not price its U.S.-outbound service to cover the cost of handling uncompleted U.S.-inbound traffic.

[14] TRA adds that many resellers have expressed an interest in exporting U.S. dial tone to overseas customers, and that this type of activity is America's best chance of driving international accounting rates toward cost. *See id* at 2.

[15] *See Brecher Letter*, at 7-8.

[16] *See id.*

[17] *Id.* at 9.

the foreign countries' infrastructure, and that resellers that provide call-back service undermine this system. EXTL argues that such carriers not only utilize the foreign countries' network without an intention to pay, but they also evade foreign taxes.

9. ASETA, an organization of South American telecommunications administrations, argues that use of "code-calling" constitutes a "deliberate and systematic scheme to avoid payment of toll charges in foreign jurisdictions", and that it imposes costs on its members' facilities.[18] ASETA requests that the FCC stop "illegal international traffic resale" directed toward its members' countries. Finally, ASETA references laws of its member states that it claims outlaw international traffic resale within those countries.

DISCUSSION

10. After reviewing the applications and pleadings before us, we find that the public convenience and necessity will be served by granting the applications to resell the international switched voice services of various U.S. common carriers.[19] Moreover, we cannot find, based on the record before us, that uncompleted call signalling constitutes an unreasonable practice under Section 201(b) of the Communications Act, as amended. Further, we make no finding with respect to the legality of the applicants' proposed activities under the *International Telecommunications Regulations*.

11. We note initially the FCC's policy in favor of resale.[20] The Commission has long recognized that increased competition in the international marketplace benefits U.S. ratepayers,[21] and has routinely granted applications for Section 214 authorizations for the resale of international switched voice services to further that goal.[22] Indeed, the Commission recently streamlined the application process for unopposed applications for such resale authority.[23] We believe the proposed services would provide similar benefits associated with increased competition, in line with the Commission's statutory mandate to establish a rapid, efficient, nation-wide, and worldwide wire and radio communication service.[24] In addition, we note that the market for international call-back services such as those at issue here has been created, at least in part, by the disparity between U.S. and foreign collection rates.[25] The use of the resold services for international call-back activity could place significant downward pressure on foreign collection rates, to the ultimate benefit of U.S. ratepayers and industry. We accordingly grant applicants' request to resell the international switched voice services of U.S. common carriers.

12. We disagree with AT&T that uncompleted call signalling constitutes an unreasonable practice under Section 201 of the Act. As an initial matter, we reject Telegroup's argument that resellers cannot violate Section 201(b) of the Act. In *Competitive Carrier*, we held that tariffs filed by nondominant carriers, including resellers, would enjoy a presumption of lawfulness because firms lacking market power could not rationally impose rates, terms or conditions that would contravene Section 201(b).[26] We emphasized, however, that nondominant carriers are common carriers and continue to be subject to obligations of common carriers, including those in Section 201(b).[27]

13. Although resellers such as the applicants are common carriers subject to Section 201(b), we do not consider uncompleted call signalling to be either an unreasonable practice under that provision, or against the public interest under Section 214. AT&T has alleged that this activity imposes costs on its ratepayers through use of AT&T's facilities without compensation. We agree with applicants, however, that AT&T has presented no evidence that uncompleted call signalling occurs often enough or makes sufficient use of the network to impede revenue-producing use of the network by AT&T or to otherwise impose specific costs on AT&T or AT&T's ratepayers. We note also that to the extent a reseller may use AT&T's network to complete calls initiated by uncompleted call signalling, AT&T does receive revenues.

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[18] ASETA Comments, at 1-2.

[19] AT&T has filed complaints against several entities allegedly engaged in call-back offerings involving resale without authorization under Section 214 of the Act. We re-emphasize that any entity reselling international common carrier services for the provision of basic communications service must receive authorization pursuant to Section 214 of the Communications Act of 1934. *See Regulation of International Accounting Rates*, Phase II, Report and Order, 7 FCC Rcd 559, 562 (1990) (*International Resale Order*), *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992); *International Competitive Carrier Policies*, 102 FCC 2d 812, 845 (1985), *reconsideration denied*, 60 R.R. 2d 1435 (1986). Therefore, any entity offering a call-back service that involves reselling international common carrier services must receive such authorization before providing service.

[20] *See, e.g. International Resale Order* at 560; *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 FCC 2d 167, 193-4 (1980); *Resale and Shared Use*, 60 FCC 2d 261 (1976) (*Resale and Shared Use*), *on reconsideration*, 62 FCC 2d 588 (1977), *aff'd sub nom., American Telephone and Telegraph Company v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978).

[21] *See, e.g., International Relay, Inc.*, 77 FCC 2d 819, 824 (1980), *recon. granted in part*, 82 FCC 2d 41 (1980). The Commission stated that "additional competition... has the effect of maintaining and improving service in a given market, while increasing the pressure on incumbent carriers to reduce prices when they exceed the costs of providing the competitive service." *Id.* at 825.

[22] We have granted over 500 certifications for resale of international switched services since 1983.

[23] *Regulation of International Common Carrier Services*, 7 FCC Rcd 7336 (1992) (*International Services*).

[24] 47 U.S.C. §151 (1992).

[25] *See Calling Prices for International Messsage Telephone Service Between the United States and Other Countries*, at 28 (cited in *Regulation of International Accounting Rates*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 8040, 8042 n.18); *see also International Telecommunication Regulations*, Article 6.1.1.

[26] *Competitive Carrier*, 85 FCC 2d at 31. We stated in *International Services* that we would presumptively treat all U.S. international carriers reselling the international switched services of a non-affiliated U.S. carrier as non-dominant, regardless of foreign affiliations. *International Services*, 7 FCC Rcd at 7335.

[27] *See Competitive Carrier*, 85 FCC 2d at 18. Indeed, we recently affirmed that nondominant carriers must comply with Section 201 (b). *See Capital Network Systems, Inc.*, 7 FCC Rcd 8092 (1992).

14. Moreover, we find little to differentiate uncompleted call signalling from other situations cited by applicants that involve uncompleted calls, such as use of a toll-saver function on an answering machine.[28] Each of these activities involves an uncompleted phone call. The costs imposed by such calls, if any, would appear to be identical. While AT&T attempts to distinguish uncompleted call signalling as "a broad-based business scheme designed to avoid toll charges on every call,"[29] we note that there is nothing in the record which suggests that the volume of uncompleted calls associated with call-back offerings is significantly greater than the number of uncompleted calls associated with the use of the toll-saver function on answering machines, or the other activities cited by applicants. Declaring the resellers' use of uncompleted call signalling to be an unreasonable practice, but allowing other uses of uncompleted calls to continue, would constitute a potentially arbitrary distinction.

15. We also believe that AT&T and its foreign correspondents have the ability to address uncompleted call signalling practices that are imposing costs on them or hampering their ability to provide international service. AT&T, or any other U.S. carrier, could enter into an agreement with its foreign correspondent to address uncompleted call signalling that is impeding revenue-producing use of its facilities by the carrier or its foreign correspondent or that is otherwise imposing costs on the carriers or their ratepayers.[30] In addition, U.S. carriers generally have tariff provisions requiring subscribers to avoid interfering with services provided by the carrier or with others using such services. These provisions could allow them to terminate service to a particular customer whose use is interfering with their ability to provide service.[31] Foreign correspondents' tariffs may well have similar provisions. A U.S. carrier could also submit a tariff containing provisions that would address uncompleted call signalling used in conjunction with an outbound service offering of that carrier. Finally, U.S. carriers are free to use the complaint process to pursue any claims supported by evidence showing that uncompleted call signalling hampers their ability to provide service or forces their customers to subsidize the applicants offerings.

16. AT&T has also cited several court decisions in support of its view that uncompleted call signalling violates the Communications Act. In one such decision, *United States v. Henny*, the Ninth Circuit upheld a trial court finding that a service provider committed wire fraud under Title 18 of the United States Code by instructing his operator to convert received-collect calls into sent paid calls, thereby gaining a higher settlement payment under a settlement agreement with an interconnecting carrier.[32] On appeal, the service provider challenged the trial judge's jury instructions. In rejecting the challenge, the Ninth Circuit court clarified that "the illegal practices defined in the judge's instruction referred only to the violation of the *standard operating procedures* adopted by companies to divide revenues..."[33] Thus, the fraud in *Henny* went only to the violation of an agreement between carriers. In the present case, the only standard operating procedures established between applicants and AT&T are defined in the tariffs of AT&T and its foreign correspondent, and AT&T has alleged a violation of neither. Therefore, we do not believe that the *Henny* case requires the Commission to find that uncompleted call signalling is against the public interest."[34]

17. We also do not believe that the other cases cited by AT&T require us to find that uncompleted call signalling is not in the public interest. In a set of unreported cases decided by United States District Courts in Kansas and Texas, the courts found that use of unaccepted person-to-person collect calls to transmit specific information[35] verbally via instructions conveyed through the operator about the location of the trucks and the extent to which the trucks were loaded violated Section 202 of the Communications Act and the underlying carriers' tariff provisions.[36] The courts reasoned that the practices allowed the truck companies to acquire valuable telephone service without payment, at great expense to the telephone com-

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[28] Telegroup asserts that many callers deliberately hang up before the call is completed in order to avoid a charge, and references AT&T's answering machine, which contains a "toll-saver" function. This function allows owners who are checking their messages from a remote location to hang up after a designated number of rings if there are no messages to be retrieved. The owner is not charged for the phone call. Viatel notes that some companies offer thermostat systems, connected to phone lines, that will not answer if the caller's system is working properly, but will answer if it is not. Viatel states that such uses of uncompleted calls are similar to uncompleted call signalling. *See* Viatel Opposition at 6.

[29] *See* AT&T's Reply to Telegroup's Opposition to AT&T's Petition to Deny, at 5-6.

[30] Pursuant to Section 43.51 of the Commission's rules, any written or oral operating agreement or amendment thereto relating to the provision of service between the United States and a foreign point must be filed with the Commission within 30 days of signing.

[31] *See, e.g.*, AT&T Tariff F.C.C. No. 1, Part 2.7.2.C; Sprint Tariff F.C.C. No. 1, Part 3.5.3. If, for example, a carrier could demonstrate through a network blockage analysis that uncompleted call signalling were tying up a particular circuit and interfering with other service offerings, the carrier may well be justified under its tariff in terminating service on that circuit.

[32] 527 F.2d 479 (1976). With respect to AT&T's contention that uncompleted call signalling constitutes wire fraud under Title 18 of the United States Code, the Department of Justice and other U.S. agencies have jurisdiction to investigate claims of wire fraud under 18 U.S.C. §1343. AT&T is free to pursue its claim of wire fraud through those agencies, or through the courts.

[33] *Id.* at 483 (*emphasis added*).

[34] We also reject AT&T's assertion that other cases brought under Title 18 of the United States Code require a finding that uncompleted call signalling is unlawful under the Communications Act. *See* AT&T Petition to Deny, at 7; AT&T Ex Parte, Attachment A, at 2. Unlike the present case, those cases involved the failure to pay for completed phone calls. *See, e.g., United States v. Freeman*, 373 F. Supp. 50 (D. Ind. 1974), *aff'd* 525 F.2d 337 (7th Cir. 1975), *cert. denied* 424 U.S. 920 (1976); *United States v. Jaworski*, 343 F. Supp. 406 (D. Minn.1972).

[35] We do not dispute AT&T's claim that a telephone ring can convey information. *See* AT&T Ex Parte, at 2-3 (*citing United States v. Caplan*, 371 F.2d 176, 180 (7th Cir. 1966); *United States v. Caplan*, 255 F. Supp. 805, 808 (E.D. Michigan 1966). Nevertheless, the Commission has never required U.S. carriers to charge for uncompleted calls. Indeed, the Commission has explicitly forbidden one class of service provider from charging for such calls. *See Policies and Rules Concerning Operator Service Providers*, 6 FCC Rcd 2744, 2764 (1991).

[36] *See Southwestern Bell v. National Van Lines, et al.*, Civ. Action No. 7021 (N.D. Tex. Sept. 27, 1957) (*National Van Lines); Southwestern Bell v. King Van Lines, et al.*, Civ. Action No. T-1524 (D. Kansas December 10, 1956) (*King Van Lines).*

panies. We do not believe, however, that the decisions cited by AT&T are inconsistent with our grant of the applications. By contrast to the uncompleted call signalling at issue here, the truck cases involved use of an operator to convey variable, specific information, with no intention ever to use this scheme to generate a compensated call. In addition, AT&T in its petitions to deny alleges no violation of its FCC tariffs or of Section 202 of the Communications Act, and has provided no evidence of costs imposed on it by uncompleted call signalling. Therefore, we conclude that the cases cited by AT&T do not require us to reject these applications.

18. In addition, in response to the concerns expressed by AT&T and by ASETA regarding international comity, we note that our authorization of applicants does not address the legality of the proposed activities under foreign law, which is a matter for foreign authorities and courts to decide. We make no finding with respect to the legality of the proposed services under the International Regulations,[37] but note that in general, U.S. international carriers are required to comply with international law. Moreover, we require in this authorization that applicants provide service in a manner that is consistent with the laws of countries in which they operate.

19. For the foregoing reasons, we find that the present and future public convenience and necessity require the provision by the applicants of the proposed service, consistent with the findings and conclusions above.

ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-93-031, I-T-C-93-050 and I-T-C-93-054 ARE GRANTED and the applicants may provide resold switched voice services consistent with the findings and conclusions of this order.

21. IT IS FURTHER ORDERED that AT&T's petition to deny IS DENIED.

22. IT IS FURTHER ORDERED that neither the applicants nor any persons or companies directly or indirectly controlling or controlled by the applicants, or under direct or indirect common control with the applicants, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which the applicants or any persons or companies controlling or controlled by the applicants are parties.

23. IT IS FURTHER ORDERED that the applicants shall file with the Commission a copy of any operating agreement they enter into with any of their foreign correspondents within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

24. IT IS FURTHER ORDERED that:

(a) The applicants shall file publicly any contracts entered into with other carriers or a contract summary in accordance with Section 203 of the Communications Act, 47 U.S.C. § 203, and the *Interexchange Order*;[38] and

(b)the services obtained by the applicants shall be made generally available to similarly situated customers at the same terms, conditions and rates.

25. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

26. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

27. This order is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[37] In the proceeding before us, no party to the proceeding has alleged on the record that the proposed activities violate international law.

[38] *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5902 (1991) (*Interexchange Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaints of Central Missouri	CSR-3910-M; MO0836
State University against	CSR-3917-M; MO0821
Douglas Cable Communications	CSR-3918-M; MO0920
II	CSR-3919-M; MO0822

Petitions for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1994; Released: May 20, 1994

By the Chief, Cable Services Bureau:

1. On December 1, 1993, petitions for reconsideration were filed on behalf of Douglas Communications Corporation II ("Douglas"), operator of cable systems serving the communities of Calhoun, Urich, Creighton and Mayview, Missouri.[1] Douglasrequests that the Commission reconsider its October 12, 1993 actions[2] ordering its Calhoun, Urich, Creighton and Mayview systems to carry Station KMOS-TV (Educ., Ch. 6), Sedalia, Missouri. An opposition to these petitions was filed December 15, 1993, on behalf of KMOS-TV, to which Douglas has responded.

2. In support of its requests, Douglas states that the four referenced cable systems serve less than 1,000 subscribers each and have only 10 usable, activated channels apiece.[3] It argues that in order to carry KMOS-TV it would be forced to remove programming that has been provided to its subscribers since at least March 29, 1990. Douglas maintains that §535(b)(2)(B)(iii) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), and §76.56(a)(3) of the Commission's Rules specifically exempts small systems, such as Douglas', from the signal carriage requirements applicable to qualified NCE stations. It therefore concludes that it should not be required to add KMOS-TV to the four cable systems noted herein.

3. KMOS-TV argues in its response that Douglas' claim that it is not required to add KMOS-TV because its systems have fewer than 12 usable, activated channels directly conflicts with §615(2)(A) of the 1992 Cable Act which requires that systems with 12 or fewer channels are required to carry the signal of at least one local noncommercial educational television station. KMOS-TV avers that at the present time Douglas provides no educational stations to its subscribers. It contends, therefore, that to avoid further irreparable harm to its station, Douglas should be required to add KMOS-TV to its systems.

4. In its response, Douglas reiterates its reliance on §76.56(a)(3) of the Commission's Rules which states that "a cable system with 12 or fewer usable activated channels *shall not be reuqired to remove any programming service provided to subscribers as of March 29, 1990, to satisfy these requirements,* except that the first available channel must be used to satisfy these requirements (emphasis added)." Since all of its 10 activated channels on each system are presently occupied by channels that have been carried since March 1, 1990, Douglas maintains that it is not required to add KMOS-TV to its systems until such time as channel space becomes available on the systems.

5. We are not persuaded by the arguments raised by KMOS-TV herein. Section 76.56(a)(3) of the rules clearly provides for an exception to the must carry requirements for NCE stations in those instances where cable systems have 12 or fewer usable channel capacity. Douglas has clearly shown that such is the case for each of the systems herein. It should be emphasized, however, that as soon as the channel capacity becomes available on each system, Douglas will be required to add KMOS-TV in order to fulfill its obligation to carry at least one NCE station pursuant to §76.56(a)(1)(i) of the Commission's Rules.

6. In light of the above, therefore, pursuant to §§0.321 and 1.106 of the Commission's Rules, the petitions for reconsideration, filed December 1, 1993, on behalf of Douglas Communications Corporation II are granted and our Orders adopted October 12, 1993 are rescinded.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[1] An "Emergency Petition for Stay" was filed concurrently with these petitions requesting that the Commission stay the effective date of its decisions until it acts on Douglas' reconsideration requests. In support of this request, Douglas argues that its reconsiderations are likely to succeed on their merits due to the small size of the systems involved. Further, it states that it was unable to present the current facts within the time allotted to respond to the original complaints due to the enormous burden Douglas faced in responding to hundreds of must carry complaints. Finally, it maintains that removal of other services to carry KMOS-TV would cause it irreparable harm and would disrupt subscribers' viewing habits, while grant of the requested stay would be in the public interest. This would not harm KMOS-TV, according to Douglas, since the total number of subscribers involved on all four systems is only 336, none of whom have received KMOS-TV previously. In view of our decision today, however, we have no need to rule on the matter herein.

[2] *Central Missouri State University against Douglas Cable Communications,* 8 FCC Rcd 7877 (1993); 8 FCC Rcd 7878 (1993); 8 FCC Rcd 7876 (1993); and 8 FCC Rcd 7882 (1993).

[3] Douglas indicates herein that the four cable systems serve the following number of subscribers: Calhoun -- 122; Urich -- 102; Creighton -- 64; and Mayview -- 48. The system did not submit any information during the pendency of the original pleading to indicate its usable channel capacity.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of KTEH-TV Foundation against Chambers Communications Corp.	CSR-4180-M CA0107

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1994; Released: May 20, 1994

By the Chief, Cable Services Bureau:

1. On January 5, 1994, a petition on behalf of KTEH-TV Foundation, licensee of Television Broadcast Station KTEH (Educ., Ch. 54), San Jose, California, was filed with the Commission[1] claiming that Chambers Communications Corp. ("Chambers"), operator of a cable television system serving Novato, California,[2] had deleted the station as of June 2, 1993, because it had determined that the Grade B contour of KTEH does not encompass the system's principal headend located at Novato at north latitude 38°06'47" and west longitude 122°32'57" and, therefore, the station is not a "local" signal within the meaning of Section 5 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).[3] An opposition to this petition was filed February 3, 1994, on behalf of Chambers.

2. In support of its request, KTEH states that it was carried on the Novato system on March 29, 1990,[4] and had been told verbally by Chambers that the signal the system received from KTEH was "excellent." However, KTEH indicates that by letter dated April 28, 1993, Chambers notified it that it would be deleted from the system on June 2, 1993, because the system headend was located outside the predicted Grade B contour of KTEH as filed with the Commission. On October 4, 1993, KTEH states that engineers from both its station and Chambers jointly measured KTEH's signal at 90.5 dBu/m at the Novato headend. Subsequently, KTEH requested carriage a second time, but it avers that it was again denied such carriage by Chambers. KTEH argues that, pursuant to §73.683(b) of the rules, the Grade B predicted contour curves of the station should be modified to include the Novato headend based on actual signal strength measurements and it submits maps and engineering data to support this request. KTEH asks that the Commission rule that the Novato system headend falls within KTEH's Grade B contour and order Chambers to carry its signal.

3. In its opposition, Chambers states that it is not obligated to carry KTEH because it does not meet the definition of a qualified noncommercial educational television station. *See* §615(l)(2) (47 U.S.C. 535). Further, Chambers argues that KTEH's reliance on an actual Grade B contour is misplaced. Chambers maintains that §615(1)(2)(B) of the 1992 Cable Act provides that the only approved definition of an NCE station's Grade B service contour is that contained in §73.683(a) of the Commission's Rules which mandates the use of predicted, not actual, contours. Finally, Chambers argues that KTEH's claim that it provides good signal quality at the system's headend is irrelevant. Chambers avers that there is no provision in the Act which requires the carriage of an ineligible NCE station because it provides a good signal.

4. We are not persuaded by KTEH's request to be considered local on the Novato system. First, KTEH's reliance for its reinstatement due to its carriage on the Novato system as of March 29, 1990, is in error. Section 615(c) states that "all cable operators shall continue to provide carriage to *all qualified local noncommercial educational television stations* whose signals were carried on their systems as of March 29, 1990." (emphasis supplied). Section 76.55(b) of the Commission's Rules defines a qualified noncommercial educational station as either one whose community of license is located within fifty miles of a cable system's principal headend or one whose Grade B service contour encompasses the principal headend. Since KTEH does not meet either of these definitions, Chambers was not obligated to continue its carriage on this ground. Further, when the Commission adopted its prescribed prediction method for the calculation of Grade B contour in the mid-1970's, we recognized that the Grade B contour was not a wall within which all services provided by a television station were confined, and, therefore, the determination of its location by the most precise means available may not be well worth the complication which might be involved. Since the contour prediction method, as prescribed by the Commission, is primarily an administrative tool, it seems clear that contours should be located by means which promote the most efficient administration, i.e., by a relatively simple procedure which produces a speedy and unequivocal result. That policy still holds true today and may well have been the intent of Congress in the 1992 Cable Act when it cited §73.683(a) as the sole reference for Grade B contour definitions. Cognizant of the above policy, the Commission is hereby rejecting KTEH's request to redefine its Grade B contour relative to the Novato cable system. Indeed, such a request, if appropriate, could only be determined through a rulemaking proceeding, not in the instant decision. Relying on the Commission's prescribed predicted Grade B contour method, KTEH does not encompass the Novato headend and, therefore, it does not qualify for must-carry status under this criterion on the Novato system.

5. In view of the foregoing, therefore, the 1992 Cable Act does not entitle KTEH to mandatory carriage on the Chambers cable television system serving Novato, California, and the complaint filed January 5, 1994, IS DIS-

[1] An earlier petition (CSR-4118-M) was filed by KTEH on June 22, 1993. However, since this petition was apparently superseded by the current filing, we hereby dismiss CSR-4118-M as moot.

[2] KTEH states that Chambers also generally serves the communities of Bel Marin Keys, Ignacio, Loma Verde and San Marin, California.

[3] We note also that KTEH's city of license, San Jose, is more than 50 miles from Novato, California.

[4] KTEH indicates that it has been carried on the Novato system since at least 1985.

MISSED pursuant to authority delgated by §0.321 of the Commission's Rules and §615(j)(3) (47 U.S.C. 535) of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 16, 1994

Released: May 20, 1994

IN REPLY REFER TO:
8310-GU
93030557
93070860

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Lee Mitchell, Receiver
Licensee, Radio Station WMOG
333 W. Wacker Drive, 30th Floor
Chicago, IL 60606

Dear Mr. Mitchell:

This letter constitutes a Notice of Apparent Liability for a Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules. Our action is based on the facts set forth below.

The Commission received a complaint alleging that on March 8, 1993, an employee of Radio Station WMOG placed a telephone call to Mr. Jack Christmas, Principal of Woodbine Elementary School, and broadcast the conversation simultaneously with its occurrence without first informing Mr. Christmas of its intended broadcast use. Based on this complaint, the Commission sent you a letter of inquiry on June 9, 1993. By reply of July 21, 1993, you concede that WMOG violated Section 73.1206 of the Commission's Rules, but maintain that the violation was a one-time, clearly inadvertent occurrence resulting from staff miscommunication, despite the presence of policies and procedures designed to prevent such occurrences.

You assert, in this regard, that the former station employees involved in the incident were experienced broadcasters fully aware of the Commission's prior notice requirement for the airing of telephone conversations. You explain that upon hearing the WMOG talk show host challenging called-in allegations regarding policies and practices at Woodbine Elementary School, the station's Acting News Director placed a call to Jack Christmas with the intention of giving him the opportunity to rebut those allegations. You state that although the News Director informed Mr. Christmas he was calling from the station, he did not inform Mr. Christmas that the conversation was to be broadcast as was his usual practice. You contend that when the News Director transferred the call, the talk show host assumed that Mr. Christmas had been given the routine notice, and was surprised to realize during the course of the conversation that Mr. Christmas was unaware the conversation was being broadcast.

Section 73.1206 of the Commission's Rules requires that "[b]efore recording a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, . . . a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation." It is clear that Mr. Christmas was not informed that the conversation was being broadcast live until well into the conversation.

Based on all the facts of this case, it appears that Radio Station WMOG, Brunswick, GA, violated Section 73.1206 of the Commission's Rules on March 8, 1993, when, without informing Mr. Christmas in advance, WMOG aired his telephone conversation with a station employee. That it may have occurred only one time and because of an employee's error does not absolve the licensee of responsibility and does not change the basically "willful" nature of the violation, as the Commission has defined the term. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Lee M. Mitchell, Receiver, licensee of Radio Station WMOG, Brunswick, GA, is hereby advised of its apparent liability for a forfeiture in the amount of $5,000 for said incident, which constitutes a willful violation of Section 73.1206. The amount of the forfeiture was determined by using the criteria set forth in the *Policy Statement on Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), and the factors set forth in Section 503(b) of the Communications Act of 1934, as amended.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Lightning Broadcasting Company against Warner Cable of Altamont — CSR-4062-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1994; Released: May 20, 1994

By the Chief, Cable Services Bureau:

1. On August 20, 1993, a petition on behalf of Lightning Broadcasting Company ("LBC"), licensee of low power television Station W41BL (Channel 41), Effingham, Illinois, was filed with the Commission claiming that Warner Cable of Altamont ("Warner"), operator of a cable television system serving Altamont, Illinois, had declined to carry the station, even though W41BL is a fully-qualified low power television within the meaning of §76.56(b)(3) of the Commission's Rules and §§614(c) and (h)(2) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Warner filed an opposition to this petition on October 27, 1993.

2. In support of its petition, LBC argues that W41BL: 1) is a 24-hour per day low power television station broadcasting from a 1 kw transmitter located at north latitude 39°16'19", west longitude 88°30'32"; 2) is located within 35 miles of Capital's principal headand; 3) is in full compliance with Part 73 of the Commission's rules governing children's programming, political broadcasting and Equal Employment Opportunity; 4) Effingham, its community-of-license, has a population of 11,851 and is not located within the 160 largest metropolitan statistical areas; 5) provides locally-originated programming; and 6) there are no full power television stations licensed to serve Effingham or its (political subdivision.[1] LBC states that it notified Warner of its obligation to carry W41BL on June 21, 1993, but the system refused carriage on July 20, 1993, stating as its reason that "there was "no such thing" as must-carry for low power television." To date, LBC maintains that Warner has still refused carriage despite the fact that it has adequate channel capacity to carry its station on the system.[2]

3. In its response, Warner argues that LBC's petition is procedurally deficient in that the station fails to provide sufficient information to determine its must-carry status. Specifically, Warner states that, despite repeated requests,[3] LBC has failed to produce a program schedule or showing that indicates that W41BL's local programming news and information needs is not being met by other stations as required by §76.55(d)(2) of the Commission's rules. Instead, avers Warner, LBC's petition merely states its qualifications for carriage in general terms and without affidavit as required by §76.7(c)(1) of the Rules and even a February 19, 1993 letter it received from LBC prior to W41BL going on the air "provides no additional description or explanation" of the 16 hours of local programming the station states it will provide. Warner maintains that as a result neither it nor the Commission has sufficient information to conclude that W41BL is entitled to must-carry status. Finally, Warner states that signal test measurements it conducted on September 2, 1993, using an Archer VU-90 10 to 15-foot antenna, indicate that W41BL's signal achieves a strength of only -61 dBm. Therefore, it concludes, LBC's signal is not qualified for carriage on its system.

4. We are not persuaded by the arguments raised by Warner in its opposition. Section 614(a) of the Communications Act of 1934, as amended, requires the carriage of "qualified" low power television (LPTV) stations in certain limited circumstances. *See* 47 U.S.C. §534(a). A LPTV station that conforms to the rulesestablished for LPTV in stations in Part 74 of the Commission's Rules will be considered "qualified" only if: 1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R. Part 73; 2) it adheres to Commission requirements regarding nonentertainment programming and employment practices;[4] 3) it complies with interference regulations consistent with its secondary status; 4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; 5) the community of license of the station and the franchise area of the cable system are both located outside the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and 6) there is no full power television broadcast

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[1] We note that §614(h)(2)(F) (47 U.S.C. 534) requires that "there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the *cable system*." (emphasis supplied.) LBC mistakenly refers to its community-of-license's county as having no full-power television station, however, since Altamont is located within the same county there is a similar result.

[2] LBC states that the *1993 Television and Cable Factbook* indicates that Warner has a channel capacity of 47 on its system, all channels of which are currently activated.

[3] Warner states that by telephone on July 20, 1993, and on numerous occasions thereafter, Mary Ann Perkins, General Manager of the Altamont system, requested that LBC provide her with information detailing W41BL's amount and nature of its local programming.

[4] Section 614(h)(2)(B) provides that the LPTV station must meet "all obligations and requirements applicable to television broadcast stations under Part 73 of Title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming: programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission [must] determine that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of geographic distance of such full power stations from the low power station's community of license." 47 U.S.C. §534(h)(2)(B); 47 C.F.R. §76.55(d).

station licensed to any community within the county or other political subdivision (of a State) served by the cable system. *See* 47 U.S.C. §534(h)(2); 47 C.F.R. §76.55(d).

5. Section 614(h)(1)(b)(iii) of the Communications Act of 1934, as amended, provides the requisite signal levels for VHF and UHF commercial stations at a cable system's headend. For UHF commercial stations, such as W41BL, a standard of -45 dBm has been established. In this instance, Warner has determined W41BL's signal strength to be below the requisite level for a UHF commercial station. However, we find that the engineering data it used to support its determination is unacceptable. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results. This is the best evidence of the availability of a station at a subject system headend.

6. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented;[5] and 4) weather conditions and time of day when test were done. When measured against these criteria, we conclude that the determination reached by Warner is insufficient to demonstrate that W41BL's signal is not of "good quality" at its system's headend.

7. Further, we are also not persuaded by Warner's argument regarding the issue of local programming. Warner rejects the information provided by LBC in its February 19, 1993 letter as an incomplete description of W41BL's intended local program schedule. However, page two of this same letter gives a clear breakdown of the local programming W41BL provides (i.e., weekly regional interview shows, high school sports, and school and local news). We find that this is sufficient to meet the requirements under §76.55(d)(2) of the Rules.

8. We find that W41BL is a qualified low power television station and that it is entitled to carriage on the Altamont, Illinois cable system. Accordingly, the complaint filed August 20, 1993, by Lightning Broadcasting Company IS GRANTED pursuant to §614(c) (47 U.S.C. §534(c)) of the Communications Act of 1934, as amended, and Warner Cable of Altamont IS ORDERED to commence carriage of low power television Station W41BL forty-five (45) days from the release date of this Order. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[5] It should be noted that a review of the engineering data submitted by Warner indicates that the anntena used for measurement and the height of the antenna departs widely from standard system practices.

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

In re:

Complaints of Greater Dayton	CSR-3980-M; IN0867
Public Television against	CSR-3981-M; IN0867
MW1 Cablesystems, Inc.	CSR-3982-M; IN0924
	CSR-3983-M; IN0870
	CSR-3985-M; IN0956

Petitions for Reconsideration

William H. Johnson, Deputy Chief
Cable Services Bureau

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1994; Released: May 20, 1994

By the Chief, Cable Services Bureau:

1. On February 14, 1994, petitions for reconsideration,[1] on behalf of MW1 Cablesystems, Inc. ("MW1"), operator of cable systems serving Economy, Metamora, Laurel and Newpoint, Indiana. MW1 requests that the Commission reconsider its December 6, 1993 actions[2] ordering MW1 to carry Television Broadcast Stations WPTD (Educ., Ch. 16), Dayton, Ohio, and WPTO (Educ., Ch. 14), Oxford, Ohio, on the above-listed systems. A response to these petitions was filed on February 24, 1994, on behalf of Greater Dayton Public Television.

2. In support of its requests, MW1 states that it is not required to carry WPTD and WPTO because the signals do not provide good quality signals to the cable systems' headends and it submits engineering studies for each system that supports this conclusion. These signal quality measurements are not only confirmed by Greater Dayton in its follow-up letter, but it also states that "it is *not* cost effective at this time to attempt to bolster its signal to the requisite levels."

3. Staff review of the undisputed engineering data submitted by MW1 confirms its contention that WPTD and WPTO's signal quality at the systems' designated headends is not sufficient to entitle the stations to mandatory carriage on MW1's cable systems serving Economy, Metamora, Laurel and Newpoint, Indiana. *See* 47 U.S.C. §535(g)(4). Accordingly, the petitions for reconsideration, filed February 14, 1994, ARE GRANTED and our Orders adopted December 6, 1993, ARE RESCINDED, pursuant to authority delegated in §§0.321 and 1.106 of the Commission's Rules.

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[1] "Emergency Petition(s) for Stay" were filed concurrently with these petitions requesting that the Commission stay the effective date of its decisions until it acts on MW1's reconsideration requests. However, due to the action taken herein, the requests for stay are unnecessary and are hereby dismissed.

[2] *Greater Dayton Public Television against MW1 Cablesystems, Inc.*, DA 93-1555, DA 93-1559, DA 93-1560, and DA 93-1556 (released January 12, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaints of San Mateo County Community College District against Multivision Cable TV Corp.	CSR-3771; CA0318 CSR-3772; CA0459

Petitions for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1994; Released: May 20, 1994

By the Chief, Cable Services Bureau:

1. On December 6, 1993, a follow-up petition for reconsideration was filed, on behalf of Multivision Cable TV Corp. ("Multivision"), operator of cable systems serving Rohnert Park and Fairfield, California. Multivision requests that the Commission reconsider its October 27, 1993 denial by letter of Multivision's original petitions for reconsideration[1] in which its Rohnert Park and Fairfield systems were ordered to commence carriage of Station KCSM-TV (Educ., Ch. 60), San Mateo, California unless it submitted engineeering data to prove its claim of poor signal quality against KCSM-TV. No opposition to this petition has been received.

2. In support of this request, Multivision submits data for the Rohnert Park system consisting of sixteen signal level readings taken over a 16-hour period by its Lead Technician, James D. Martindale on November 17 and 18, 1993, and data for the Fairfield system consisting of fifteen signal level readings taken over a 25-hour period by its Lead Technician, Richard Libert on November 17 and 18, 1993. Both sets of data demonstrate, consistent with Commission requirements, that KCSM-TV's signal strength for both systems is substantially below the level of -45 dBm required for UHF stations.

3. Staff review of the undisputed engineering data submitted by Multivsion confirms its contention that KCSM-TV's signal quality at the systems' designated headends is not sufficient to entitle the station to mandatory carriage on Multivision's cable systems serving Rohnert Park and Fairfield, California. *See* 47 U.S.C. §535(g)(4). Accordingly, the petition for reconsideration, filed December 6, 1993, on behalf of Multivision Cable TV IS GRANTED, and our Orders adopted May 28, 1993[2] ARE RESCINDED, pursuant to authority delegated in §§0.321 and 1.106 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

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[1] Separate petitions for reconsideration for Rohnert Park and Fairfield were filed by Multivision on July 1, 1993.

[2] *San Mateo County Community College District against Multivision-Yountville - Multivision Cable TV*, DA 93-623 (released June 24, 1993), and DA 93-624 (released June 14, 1993).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition Requesting Reduction in Number of Amateur Service Operator License Classes. RM-8436

ORDER

Adopted: May 13, 1994; Released: May 20, 1994

By the Acting Deputy Chief, Private Radio Bureau:

1. On January 28, 1994, The Cass County Amateur Radio Club (CCARC) filed a petition for rule making requesting that the amateur service rules be amended to retain only the Novice, Technician, and General Operator Classes from the present five class license structure.

2. The petitioner would, in effect, combine the present Amateur Extra, Advanced, and General Class operators together with those Technician Class operators who have demonstrated telegraphy skill. They would have full operator privileges. The key contention of CCARC is that the majority of amateur operators are dissatisfied with the current operator license class structure. The CCARC states that most other countries already have a three class license structure.

3. We believe, however, that the views previously expressed by members of the amateur service community through thousands of comments in numerous rule making proceedings continue to be valid. Hence, in our view, the amateur community, by and large, is satisfied with the current structure, the fundamental purpose of which is the encouragement and improvement of the amateur service in the United States through rules that provide for advancing skills in both the communication and technical phases of the art.[1] We do not, therefore, believe that the arguments that the petitioner has submitted warrant revisiting the matter at this time.[2]

4. In view of the foregoing, and pursuant to Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e), rule making petition RM-8436 is repetitive and IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Acting Deputy Chief
Private Radio Bureau

[1] *See* Section 97.1(c) of the Commission's Rules, 47 C.F.R. § 97.1(c).

[2] The petitioner also requested that the holder of a Technician or General Class Operator license be authorized to be the control operator of a space station. The Rules, however, already permit the holder of any class of amatur operator license to be the control operator of a space station. *See* Section 97.207(a) of the Commission's Rules, 47 C.F.R. § 97.207(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-37

In the Matter of

Amendment of Section 73.202(b), RM-8449
Table of Allotments,
FM Broadcast Stations.
(Lihue Kauai, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 21, 1994; Released: May 20, 1994

By the Acting Chief, Allocations Branch:

Comment Date: July 11, 1994
Reply Comment Date: July 26, 1994

1. The Commission has before it the petition for rule making filed by Linohau Entertainment ("petitioner"), proposing the allotment of Channel 251C at Lihue Kauai, Hawaii, as that community's third local FM transmission service. Petitioner stated its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 251C at Lihue Kauai, Hawaii, since it could provide the community with its third local FM transmission service. An engineering analysis has determined that Channel 251C can be allotted to Lihue Kauai in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at city reference coordinates.[1]

3. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lihue Kauai, Hawaii	228C1, 245C1 251C	228C1, 245C1 251C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 11, 1994**, and reply comments on or before **July 26, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard A. Helmick
Cohn and Marks
1333 New Hampshire Ave., N.W.
Suite 600
Washington, D.C. 20036
(Attorney for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 251C at Lihue Kauai are North Latitude 21-58-48 and West Longitude 159-22-30.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-36

In the Matter of

Amendment of Section 73.202(b) RM-8447
Table of Allotments,
FM Broadcast Stations.
(Flandreau, South Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 21, 1994; Released: May 20, 1994

Comment Date: July 11, 1994
Reply Comment Date: July 26, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Carmen C. Christensen ("petitioner"), proposing the allotment of Channel 300C3 at Flandreau, South Dakota, as that community's first local aural transmission service. Petitioner states his intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 300C3 at Flandreau, South Dakota, since it would provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 300C3 can be allotted to Flandreau in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Flandreau, South Dakota	--	300C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 11, 1994**, and reply comments on or before **July 26, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis F. Begley, Esq.
Reddy, Begley & Martin
1001 22nd Street, N.W., Ste. 350
Washington, D.C. 20037
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

[1] The coordinates for Channel 300C3 at Flandreau are North Latitude 44-02-54 and West Longitude 96-35-30.

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-181

In the Matter of

Amendment of Section 73.202(b),	RM-7696
Table of Allotments,	RM-7817
FM Broadcast Stations.	
(Ashland, California, Rolla	
and Monroe City, Missouri)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 2, 1994; Released: May 20, 1994

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration a Petition for Reconsideration of the *Report and Order*, 8 FCC Rcd 1799 (1993), filed by Sobocomo Radio, Inc. ("Sobocomo").[1] The *Report and Order* substituted Channel 232C2 for Channel 232A at California, Missouri, and modified the license for Station KZMO-FM to specify operation on the higher class channel in response to a petition filed by Town and Country Communications, Inc. ("Town and Country"). To accommodate Channel 232C2 at California, we substituted Channel 292A for Channel 232A at Rolla, Missouri, and modified the license for Station KQMX(FM) accordingly. The *Report and Order* dismissed the counterproposal filed by Sobocomo requesting the substitution of Channel 291C1 for Channel 291C2 at Ashland, Missouri, and modification of its construction permit to specify operation on Channel 291C1. To accommodate the upgrade at Ashland, Sobocomo requested the substitution of Channel 298A for Channel 292A at Monroe City, Missouri, and modification of the license for Station KDAM(FM)'s license.

2. In the *Report and Order*, we adopted the California proposal based on a comparison of the populations within the predicted gain areas. We did not accept the settlement agreement filed in the proceeding. As noted in the *Report and Order*, although the settlement would have resolved existing short spacings in the proceeding, it introduced the community of Wheeling, Missouri, which was not a part of the initial proceeding or counterproposal, and thus constituted an untimely filed counterproposal. Therefore, neither it nor the settlement agreement could be accepted as filed. *See* Section 1.420(d) of the Commission's Rules and the *Appendix* to the *Notice*.

3. Sobocomo's petition for reconsideration argues that the Commission should not have denied the counterproposal and settlement agreement. Sobocomo now proposes a resolution to the conflicts in this proceeding using channels and sites which do not affect the allotment of Channel 232C2 at California or the Wheeling allotment and will allow for the C1 upgrade at Ashland. In order to proceed with our analysis of Sobocomo's petition for reconsideration, we issued an *Order to Show Cause*, 8 FCC Rcd 7621 (1993), to Station KDAM, Channel 292A, Monroe City, Missouri, why its license should not be modified to specify operation on Channel 298A. Sobocomo has expressed its willingness to reimburse Station KDAM for the reasonable costs it would incur in changing to Channel 298A, pursuant to the Commission's guidelines in *Circleville, Ohio*, 8 FCC 2d 159 (1967).

4. Monroe City Broadcasting, Inc., the licensee of Station KDAM, filed no response to the *Order to Show Cause* why its license should not be modified. Accordingly, pursuant to Section 1.87 of the Commission's Rules, it is deemed to have consented to the channel change.

5. In consideration of the above, we believe the public interest would be served by substituting Channel 291C1 for Channel 291C2 at Ashland, Missouri, and modification of the construction permit for Station KBXR, since it could provide the community with additional reception service.[2] To accommodate Channel 291C1 at Ashland, we shall substitute Channel 298A for Channel 292A at Monroe City, Missouri, and modify the license for Station KDAM to specify operation on Channel 298A. The Monroe City substitution can be made at the licensed site for Station KDAM.[3] Further, Progressive Broadcasting Company of Missouri ("Progressive"), licensee of Station KQMX(FM), Rolla, Missouri, has agreed to the substitution of Channel 248A for Channel 292A at a new site to accommodate the upgrade at Ashland.[4] Sobocomo has stated its intent to reimburse Progressive for the reasonable costs involved with changing channels.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective June 27, 1994, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Ashland, Missouri	291C1
Monroe City, Missouri	298A
Rolla, Missouri	287C1, 248A

[1] I Public Notice of the Petition for Reconsideration was given on May 27, 1993 (Report No. 1943).

[2] I The coordinates for Channel 291C1 at Ashland are 38-43-39 and 92-40-39. Channel 291C1 at this site is currently short spaced to Channel 290C2, Bolivar, Missouri. However, Channel 290C2 was reallotted from Bolivar to Nixa, Missouri, in MM Docket 90-485. *See* 6 FCC Rcd 3648 (1991).

[3] I The coordinates for Channel 298A at Monroe City are 39-35-12 and 91-47-57.

[4] The coordinates for Channel 248A at Rolla Are 37-56-40 and 91-47-30. Although Channel 248A is short spaced to Channel 249A, Station KFBD-FM, Waynesville, Missouri, the *Report and Order* in MM Docket 91-229 substituted Channel 250A for Channel 249A at Waynesville, which removes the conflict. *See* 7 FCC Rcd 1036 (1992). Channel 292A was substituted for Channel 232A at Rolla in this same proceeding to accommodate Channel 232C2 at California, Missouri. Progressive has an application on file for Channel 292A (BPH-931112IB).

7. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Sobocomo Radio, Inc. IS GRANTED.

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KBXR, Ashland, Missouri, Channel 291C2, IS MODIFIED to specify operation on Channel 291C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316(a) of the Communications Act of 1934, as amended, that the License of Station KDAM, Channel 292A, Monroe City, Missouri, IS MODIFIED, to specify operation on Channel 298A and the license for Station KQMX, Channel 292A, Rolla, Missouri, IS MODIFIED, to specify operation on Channel 248A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-810716AF (Monroe City) or license BMLH-910514KE (Rolla) except for the channel as specified above. Any changes, except those specified require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-810716AF (Monroe City) or license BMLH-910514KE (Rolla), except for the channel as specified above, and a license application (Form 302) is filed within 10 days of commencement of program tests.

10. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sobocomo Radio, Inc., permittee of Station KBXR, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send, by Certified Mail, Return Receipt Requested, a copy of this Memorandum Opinion and Order to:

Monroe City Broadcasting, Inc.
Station KDAM
P.O. Box 38
Monroe City, Missouri 63456

B-D, Inc.
Station KFBD-FM
(Waynesville) Box 58
Linn Creek, Missouri 65052

Sunburst II, Inc.
Station KGBX-FM
3930 L.B.J., Suite 400
Dallas, Texas 75240

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-71

In the Matter of

Amendment of Section 73.202(b), RM-8134
Table of Allotments,
FM Broadcast Stations.
(Wickenburg, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 10, 1994; Released: May 20, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 8 FCC Rcd 2246 (1993), issued in response to a petition for rule making filed on behalf of Circle S Broadcasting Co. ("petitioner"), licensee of Station KMEO(FM),[1] Channel 229A, Wickenburg, Arizona, proposing the substitution of Channel 231C3 for Channel 229A at Wickenburg and modification of its authorization accordingly to specify operation on the higher powered channel. Petitioner filed supporting comments reiterating its intention to apply for Channel 231C3 if allotted to Wickenburg, as requested. Informal comments were filed by Harry E. Craig ("Craig"), counsel for the Town of Wickenburg.[2] Comments and an addendum were filed by Vulture Peak Restoration Group ("Vulture"). Petitioner filed reply comments and a Supplement to the Reply. No other comments were received.

2. *Background.* As stated in the *Notice*, although petitioner's proposal complies with the minimum distance separation requirements of Section 73.207(b)(1) and (e) of the Commission's Rules, we questioned whether, at its specified site, located 18.6 kilometers (11.6 miles) southwest of the community at coordinates 33-51-31 and 112-53-04, the requirements of Section 73.315 of the Commission's Rules could be met. While petitioner proposed to employ conventional Class C3 facilities (*i.e.*, 25 kW effective radiated power ("ERP") and an antenna of 100 meters height above average terrain ("HAAT") at its proposed site, or its equivalent from a higher elevation, our initial engineering analysis determined that a terrain obstruction of approximately 870 meters (2,854 feet) above mean sea level ("AMSL") lies approximately 8.0 kilometers (5.0 miles) northeast of the specified site. As the average terrain elevation at the petitioner's proposed site is 723.8 meters AMSL, operation with maximum Class C3 facilities would place the antenna radiation center 823.8 meters AMSL. Since the ground level at the proposed site is 787.4 meters (2,582.7 feet) AMSL, we determined that conventional Class C3 facilities would not provide a 70 dBu signal over the entire community of Wickenburg. Therefore, in order to comply with the requirements of Section 73.315 of the Commission's Rules, we determined that a tower of at least 256.4 meters (841.0 feet) AGL would be required in this instance.

3. Petitioner was advised that the Commission generally will not make an allotment in the absence of a showing to demonstrate the availability of a site that will clear any major intervening obstructions and provide the community with a minimum signal intensity of 70 dBu, citing *Pickney ville, Illinois*, 41 RR 2d 69, 71 (1977). Therefore, as petitioner's proposal did not include specific showings to demonstrate its ability to provide a 3.16 mv/m contour over the entire principal community of Wickenburg, it was requested to provide such information in response to the *Notice*. Moreover, petitioner was requested to provide evidence of FAA clearance for a tower of 256.4 meters (841.0 feet) at its specified site to accommodate its proposal.

4. *Comments.* In its comments petitioner reiterates its intention to apply for Channel 231C3, if allotted to Wickenburg, and included an engineering statement to demonstrate that by employing a tower of 257 meters AGL at its specified site, the requirements of the Commission's technical rules would be met. Petitioner also included a copy of its notification to the FAA seeking approval for the erection of the required tower at its specified site to accommodate its modification request.'5. Vulture describes itself as an "ad hoc organization of local Wickenburg citizens and homeowners in whose vicinity the present 499 foot tower of [petitioner's] Station KTIM(AM) is located." Vulture's comments are directed to the environmental impact it believes results from the petitioner's existing tower, as well as the presumed impact the proposed tower for Station KMEO(FM) would have on the economic and aesthetic values of the members of its group (which it states "represents at least 400-500 people.") Vulture urges that petitioner's modification request be subject to the removal of its existing 499 foot tower for Station KTIM(AM) and its relocation to an area beyond an 11.6 mile radius of Wickenburg. Further, Vulture requests that petitioner's modification proposal be subject to an environmental assessment showing that the proposed antenna to accommodate Channel 231C3 would be environmentally defensible. Vulture also comments that the present 6 kilowatt operation of Station KMEO(FM) results in interference on television Channels 8 and 10 and speculates that adoption of petitioner's proposal could intensify that interference significantly.

[1] Formerly Station KFMA(FM). The call letters were changed effective March 1, 1993.

[2] Craig's comments included excerpts from minutes of the Wickenburg Town Council and the Airport Advisory Commission regarding the petitioner's modification proposal. Craig's comments were not filed in accordance with the requirements of Section 1.420(c) of the Commission's Rules and paragraph 4 of the Appendix to the *Notice of Proposed Rule Making*. However, we reviewed the comments to determine their relative merit since they object to petitioner's proposal based upon technical, aesthetic and environmental concerns. As a result of our review, we conclude that the comments have no bearing on the issue of whether the public interest would be served by an upgraded service at Wickenburg. Therefore, Craig's comments, as well as the petitioner's response thereto, will not be considered in this proceeding.

6. In responsive comments, petitioner states that Vulture's request that the tower for its Station KTIM(AM) be dismantled as a prerequisite to approval of the instant modification request for Station KMEO(FM) is inappropriate since its AM facility is operational. Therefore, and in the absence of a showing that technical reasons would preclude both operations, petitioner comments that the Commission does not have the jurisdiction to require Station KTIM(AM) to cease operating. Petitioner adds that Vulture's comments concerning the environmental impact of its present operation of Station KTIM(AM) is also inappropriate since it was granted authority by the Commission in 1991 to construct the current 499 foot tower (*See* File No. BP-911023AC). With respect to Vulture's request that it be required to undertake an environmental assessment to demonstrate that its proposed tower for Station KMEO(FM) would be environmentally defensible, petitioner remarks that any such concern will be addressed in the application context.

7. As to Vulture's contention regarding the potential hazard to air navigation posed by the proposed tower for Station KMEO(FM), petitioner comments that such decision lies within the purview of the Federal Aviation Administration ("FAA"). In supplemental comments, petitioner provides evidence of the FAA's determination that its proposed tower of 843 feet above ground level at its specified site would present no hazard to air navigation.[3]

8. With regard to Vulture's contention that the petitioner's proposed modification operation would exacerbate the degree of interference presently created on television Channels 8 and 10 by its current 6 kW operation, petitioner comments that such argument is speculative at best, and, in any event, potential interference resulting from its operation must be addressed by the affected licensee.

9. *Discussion.* Initially, we find that Vulture's concerns regarding the alleged environmental impact created by the existence of petitioner's 499 foot tower for Station KTIM(AM) is inappropriate for consideration since the Commission granted it authority to construct the tower in 1991. To the extent Vulture also expressed environmental impact concerns with regard to the proposed construction of a 257 meter AGL tower to accommodate the instant modification proposal, that is an inappropriate matter for consideration in the rule making context. Issues relating to environmental assessments are relevant at the application context. *See* 47 C.F.R. Section 1.1301, *et seq.*

10. As petitioner correctly notes, Vulture's comments regarding alleged interference that its present or proposed operation creates on television Channels 8 and 10 is purely speculative, in the absence of any technical demonstrations by the affected licensees.

11. We also find that petitioner provided suitable information to conclude that it can place a 70 dBu signal over Wickenburg from its proposed site. Moreover, based upon documentation presented in response to the *Notice*, petitioner has demonstrated that it has received FAA approval for the antenna height necessary to accommodate its proposal.

12. In consideration of the above, we find that no valid objection exists to warrant a denial of petitioner's modification request. Therefore, we believe the public interest would be served by substituting Channel 231C3 for Channel 229A at Wickenburg since it could provide the community with an expanded coverage area FM service.

13. As indicated in the *Notice*, Channel 231C3 can be allotted to Wickenburg at the petitioner's proposed site, located 18.6 kilometers (11.6 miles) southwest of the community at coordinates 33-51-31 and 112-53-04, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules. Additionally, as Wickenburg is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government to the proposed allotment of Channel 231C3 to that community was obtained.

14. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Circle S Broadcasting Co. for Station KMEO(FM) to specify operation on Channel 231C3 in lieu of Channel 229A at Wickenburg, Arizona.

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 27, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Wickenburg, Arizona	231C3, 287C1

16. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Circle S Broadcasting Co. for Station KMEO(FM) (File No. BLH-920922KC), IS MODIFIED to specify operation on Channel 231C3 in lieu of Channel 229A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

17. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to

[3] According to the FAA's aeronautical study, in reaching a determination, it evaluated the impact of the proposed structure for Station KMEO(FM) on visual and instrument flight procedures, both terminal and enroute, navigational aids, existing and proposed public use aeronautical facilities, as well as the cumulative impact of the proposed structure with other proposed or existing structures.

implement the change in community of license and/or upgrade. As a result of this proceeding, Circle S Broadcasting Co., licensee of Station KMEO(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade at Wickenburg, Arizona.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Edna Cornaggia File No. 3540-CM-P-83

Authorization To Construct
and Operate Multichannel
Multipoint Distribution Service
station WLW875 at Midland, Texas

ORDER ON RECONSIDERATION

Adopted: May 12, 1994; Released: May 23, 1994

By the Chief, Domestic Facilities Division:

1. *Introduction.* Edna Cornaggia (Cornaggia) filed a petition for reconsideration requesting reinstatement of her conditional license for Multichannel Multipoint Distribution Service (MMDS) station WLW875 on the E-group channels at Midland, Texas.

2. *Background and Contentions.* On April 15, 1993, the Domestic Facilities Division (Division) granted Cornaggia's authorization at Midland. The authorization contained four (4) express conditions which stipulated the submission of specified documents by a prescribed date. The following language appeared on the face of the authorization:

> Failure to comply exactly and completely with the following conditions will result in automatic forfeiture of this authorization on July 16, 1993.
>
> Prior to construction commencement, and no later than July 15, 1993, each of the following documents must be filed at the FCC:
>
> (1) A fully-executed deed, lease or option agreement per CFR Sec. 21.15(a).
>
> (2) A fully-executed financial certification per 47 CFR Sec. 21.17.
>
> (3) A non-affiliation statement per 47 CFR Sec. 21.900.
>
> (4) The address of the control point and/or studio.

3. Cornaggia's financial certification, as well as the non-affiliation statement were filed on or before the prescribed date of July 15, 1993. However, Cornaggia failed to satisfy the other two conditions on the authorization by July 15, 1993. Consequently, the authorization was automatically forfeited by operation of the express conditions contained therein.[1] By letter dated July 15, 1993, Cornaggia informed the Commission that its control point and/or studio would have to be changed from its originally proposed site to accommodate the needs of Odessa Wireless for additional channel capacity at a single site.[2] In order to accommodate the co-location of the control point and/or studio with the transmission facilities, Cornaggia anticipated a change of site location and stated her intent to file a modification application as soon as a new site was located. For these reasons, Cornaggia stated that she had not secured a deed, lease, or option for a site by the date prescribed in her authorization.

4. On September 27, 1993, more than two months after the automatic forfeiture and concurrent with the filing of this petition for reconsideration, Cornaggia filed a modification application to change location. Cornaggia maintains that site availability has been now established through the filing of this modification application. Under these circumstances, Cornaggia argues, that reinstatement of the authorization would be in the public interest.

5. *Discussion.* Section 21.44(b) of the Commission's Rules, 47 C.F.R. Section 21.44(b), provides that a license forfeited may be reinstated if the Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience and necessity.[3] Petitions for reinstatement under this subsection will be considered if: (1) the petition is filed within thirty days of the expiration date; (2) the petition explains the failure to timely file such notification or application as would have prevented automatic forfeiture; and (3) the petition sets forth with specificity the procedures which have been established to insure the timely filings in the future. As noted, Cornaggia did not file all of the requested documents before July 15, 1993, the date expressly stated on her authorization. Nor did she file her modification application before July 15, 1993. In order to make changes to any of the express conditions indicated on an authorization, a modification application should have been filed. *See* Section 21.40. Instead of filing the required modification application, by letter dated July 15, 1993, Cornaggia requested "such additional time as is necessary to submit the contemplated modification application." She did not file the modification application until September 27, 1993. We believe that Cornaggia has not presented sufficient evidence to justify her failure to timely file the modification application. Consequently, petitioner has not presented any justification for reinstatement under Section 21.44(b).

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[1] By Public Notice, Report No. D-712-A, released September 9, 1993, Cornaggia's conditional license was listed as forfeited, as of July 15, 1993.

[2] Odessa Wireless, a local company interested in developing a wireless cable system in Midland, Texas, entered into an agreement with Cornaggia in which Cornaggia agreed to provide transmission services to Odessa Wireless at the Midland, Texas site. Greenwood Wireless Limited Liability Company is Odessa's successor-in-interest in this venture.

[3] Cornaggia cites Line of Site, 8 FCC Rcd 3145 (1993), to support her argument for reinstatement. In that case, Line of Site failed to comply with the conditions of its license and its authorization was automatically forfeited. On reconsideration, Line of Site filed the required documents within the reinstatement period and satisfied the requirements of Sections 21.44(b)(2) and (b)(3) in that it explained its failure to timely file the specified documents and stated the procedures adopted to prevent future forfeitures. These two cases, however, can be distinguished. Unlike Line of Site, Cornaggia did not file all of the required documents within the reinstatement period. Instead, more than two months after the automatic forfeiture, Cornaggia filed a modification application, to change transmitter site location, and therein stated the reasons for her failure to file a deed, lease, or option agreement.

6. *Conclusion.* Based on these considerations, we find that reinstatement of the above-referenced conditional license is not justified. Accordingly, IT IS ORDERED that the petition for reconsideration and reinstatement filed by Edna Cornaggia regarding the MMDS conditional license at Midland, Texas is DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. *See* 47 C.F.R. Secs. 1.4(b), 1.106, and 1.115

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WJCT, Inc. File No. 50556-CM-MP-93
For Modification to
Multichannel Multipoint
Distribution Service
Station on the E-group Channels
at Jacksonville, Florida

ORDER ON RECONSIDERATION

Adopted: May 12, 1994; Released: May 23, 1994

By the Chief, Domestic Facilities Division:

I. INTRODUCTION

1. The Diocese of St. Augustine, Inc. (Diocese) filed a petition for reconsideration of the grant by the Domestic Facilities Division (Division) on delegated authority of the modification application of WJCT, Inc.'s Multichannel Multipoint Distribution Service station WHT675 on the E-group channels at Jacksonville, Florida.[1]

II. BACKGROUND

2. WJCT's modification application was filed on April 28, 1993, and was subsequently granted on June 28, 1993.[2] Subsequent to grant, the Diocese, an applicant for an Instructional Television Fixed Service (ITFS) station on the D-Group channels at Jacksonville (File No. BPLIF-930219EK), filed this petition for reconsideration. The Diocese claims that WJCT's modification application was defective and should have been dismissed as unacceptable for filing.[3]

3. Specifically, the Diocese argues that as its ITFS application was filed on February 19, 1993, before the filing of WJCT's April 28, 1993 modification application, WJCT was required to consider the Diocese's previously-proposed ITFS application.[4] Because of this failure, the Diocese states that WJCT's application contained an inaccurate interference engineering study. In addition, the Diocese contends it was never served with a copy of WJCT's application and interference analysis. Further, the Diocese asserts that it would receive harmful electrical interference from the modifications proposed to station WHT675. Finally, the Diocese claims that the omission of its application in WJCT's interference analysis was a deliberate attempt to conceal facts from the Commission. The Diocese contends that in a petition to deny filed by WJCT against the ITFS application of the Diocese for the D-group channels in Jacksonville, WJCT argues that the Diocese's ITFS application should not be granted because station WHT675 would cause harmful interference to the station proposed by the Diocese.[5] This acknowledgement, according to the Diocese, clearly indicates that WJCT had knowledge of the potential for harmful interference, but deliberately chose to ignore this fact in its own modification application's interference analysis.

4. *Opposition.* WJCT asserts that the petition filed by the Diocese is procedurally defective in that it did not meet the threshold requirements of Section 1.106. Specifically, WJCT states that because the Diocese delayed filing its objection to the grant of the modification application, it now seeks to protect its interests, after the fact, through the filing of a petition for reconsideration, rather than a petition to deny. WJCT states that because of this failure to act by filing a petition to deny within thirty days after the modification application appeared on public notice, *See Public Notice*, Report No. D-697 (May 26, 1993), the Diocese cannot show that it did not have an opportunity to participate earlier and raise its objections to the grant of WJCT's modification application, as is required by Section 1.106(b)(1). In addition, WJCT states that while the Diocese's interference study purports to show that WJCT's transmitter will cause interference to the reception of the Diocese's *proposed* ITFS transmitter at its *proposed* receivers, *proposed* ITFS reception from *proposed* transmitters is not protected from MDS transmissions by the Commission rules.[6] Thus, WJCT contends "that the Diocese has not specified any legally recognized and legally remedial harm that will flow to it from the grant of [WJCT's modification] application."

5. In addition, WJCT maintains that the Diocese's argument regarding interference protection is erroneous. WJCT states that, pursuant to Section 21.902(i), it is required to file an interference analysis only for an ITFS station(s) which is licensed or has a construction permit authorized. Because the Diocese was not a licensee or construction authorization holder, WJCT argues that it was not required to consider the Diocese in its analysis, nor serve them a copy of its analysis. Regarding the Diocese's claim that WJCT knowingly concealed the existence of the Diocese's application, WJCT asserts that as there was no duty to include the Diocese in its interference analysis, there was no concealment.

III. DISCUSSION

6. Section 21.902(i) sets forth the interference protection that MMDS applicants must demonstrate to ITFS licensees

[1] WJCT's modification application proposed to change the transmitter site to (1) colocate with the adjacent channel MMDS station and ITFS stations in Jacksonville, Florida, (2) increase transmitter output power to 100 watts from 10 watts, and change the antenna system. (File No. 50556-CM-MP-93).

[2] WJCT's modification application was listed as granted in Public Notice, Report No. D-703A, released July 8, 1993.

[3] We note that WJCT also filed an ITFS application for the D-group channels at Jacksonville (File No. BPLIF-920223DF).

[4] The Diocese proposes a transmitter site within 2.8 miles of WJCT's station WHT675.

[5] WJCT filed its Petition to Deny the ITFS application of the Diocese on June 11, 1993. This petition will be addressed in the ITFS proceeding.

[6] Opposition to Petition for Reconsideration at 3.

and construction permittees.[7] It specifically provides that the applicant must submit an analysis demonstrating that the operation of the applicant's transmitter will not cause harmful interference to any existing cochannel or adjacent channel ITFS station which is licensed or has an authorized construction permit. "Prior to our adoption of the *Wireless Cable Order*, an MMDS applicant, before grant of its application, was required to file an ITFS interference analysis for only *licensed* ITFS stations, pursuant to former Section 21.902(i). That rule [section] did not include a duty to analyze ITFS [proposed applicant stations] or construction [permitee stations]. The *Wireless Cable Order*, in specifying that ITFS interference analyses would be filed by MMDS applicants, instead of primarily being filed by MMDS conditional licensees, changed the timing for filing the ITFS interference analyses, while the class of ITFS entities analyzed by an MMDS applicant remained the same, *i.e.*, the ITFS *licensee*." *Wireless Cable Reconsideration Order*, 6 FCC Rcd 6764, 6772 (1991). The *Reconsideration Order* further noted that MMDS applicants would also have a duty to file an interference analysis for an ITFS E or F-group construction permittee, if the construction permit was authorized by grant of an ITFS application filed prior to May 26, 1983 (grandfathered E and F-group ITFS), proposing a transmitter site within 50 miles of the proposed transmitter location of the MMDS station. Therefore, under Section 21.902(i) ITFS licensees and construction permittees are the proper class of entities to be considered in a Sec. 21.902(i) interference analysis.

7. The Diocese is neither a licensee, nor a construction permittee, but rather is an applicant for the D-group channels at Jacksonville. As the Diocese is merely an applicant, WJCT was not required to file an interference analysis to demonstrate non-interference to the station proposed by the Diocese.[8] Nor, was WJCT required to serve a copy of its interference analysis, as the Diocese was neither an ITFS licensee or construction permittee, pursuant to Section 21.902(i)(3).[9] In the *Reconsideration Order*, the Commission rejected including ITFS applicants among the class of entities to be considered in a Sec. 21.902(i) interference analysis. "According such status to pending ITFS applications may prevent MMDS stations from going on the air. If there are a number of pending, mutually-exclusive, cochannel ITFS applications in a particular area, and MMDS applicants are required to show a lack of harmful interference to each, the task for the MMDS applicant becomes nearly impossible due to conflicts in technical design, specifications and locations of the various ITFS proposals." *Id.* at 6773.

IV. CONCLUSION

8. Having carefully considered all of the arguments and evidence presented, IT IS ORDERED that the Petition for Reconsideration filed by The Diocese of St. Augustine, Inc. concerning the modification application of WJCT, Inc. at Jacksonville, Florida IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

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[7] Section 21.902(i) provides:

For each application for stations in the 2596-2644MHZ, 2650-2656MHz, 2662-2668MHz, and 2674-2680 MHz frequency bands filed on or after December 30, 1991, the applicant must submit an analysis demonstrating that operation of the applicant's transmitter will not cause harmful interference to any existing, cochannel and adjacent channel D-channel, E-channel, F-channel, or G-channel Instructional Television Fixed Service (ITFS) station, licensed or with a construction permit authorized, with a transmitter site within 50 miles of the coordinates of the Multichannel Multipoint Distribution Service (MMDS) or MDS H-channel station's proposed transmitter site.

[8] Inasmuch as Commission rules did not require WJCT to demonstrate a lack of harmful interference to the station proposed by the Diocese, WJCT was under no obligation or duty to present information regarding the Diocese in its analysis. Thus, the Diocese's allegation of concealment by WJCT has no merit.

[9] Although we agree with WJCT's position regarding the interference demonstration required, we disagree with WJCT's assessment that the Diocese's petition for reconsideration is procedurally defective. Pursuant to Section 1.106, any party to a proceeding or other parties adversely affected by any action taken by the Commission or designated authority, may file a petition requesting reconsideration of the action. Parties adversely affected shall show why it was not possible to participate in the earlier stages of the proceeding. Here, the Diocese argues that the potential for interference would adversely affect its interest in its pending ITFS application and that it had no opportunity to file its petition earlier. In view of these considerations, we find the filing of this petition for reconsideration was not procedurally defective.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Lightning Broadcasting Company against Capital Cable Partners — CSR-4057-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1994; Released: May 23, 1994

By the Chief, Cable Services Bureau:

1. On August 20, 1993, a petition on behalf of Lightning Broadcasting Company ("LBC"), licensee of low power television Station W41BL (Channel 41), Effingham, Illinois, was filed with the Commission claiming that Capital Cable Partners ("Capital"), operator of a cable television system serving Vandalia, Brownstown and Ramsey, Illinois, had declined to carry the station, even though W41BL is a fully-qualified low power television station within the meaning of §76.56(b)(3) of the Commission's Rules and §§614(c) and (h)(2) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Capital filed a response to this petition on September 17, 1993.

2. In support of its petition, LBC argues that W41BL: 1) is a 24-hour per day low power television station broadcasting from a 1 kw transmitter located at north latitude 39°16'19", west longitude 88°30'32"; 2) is located within 35 miles of Capital's principal headand; 3) is in full compliance with Part 73 of the Commission's rules governing children's programming, political broadcasting and Equal Employment Opportunity; 4) Effingham, its community-of-license, has a population of 11,851 and is not located within the 160 largest metropolitan statistical areas; 5) provides locally-originated programming; and 6) there are no full power television stations licensed to serve Effingham or its political subdivision.[1] LBC states that it notified Capital of its obligation to carry W41BL on June 21, 1993, but the system refused carriage on July 20, 1993, citing W41BL's poor signal quality as its reason. Although LBC believes W41BL's signal strength to be adequate, it indicated to Capital in its original letter that it would provide whatever equipment would be necessary should its signal prove to be inadequate. To date, however, LBC maintains that Capital has still refused carriage despite the fact that it has adequate channel capacity to carry its station on the system.[2]

3. In its response, Capital states that on July 20 and September 10, 1993, it performed a second set of signal level tests for W41BL in Vandalia, Brownstown and Ramsey. Capital maintains that these tests indicate that W41BL's signal quality does not meet the required signal level of -45 dBm for UHF signals and therefore is not required to be carried on its system.

4. We are not persuaded by the arguments raised by Capital in its response. Section 614(a) of the Communications Act of 1934, as amended, requires the carriage of "qualified" low power television (LPTV) stations in certain limited circumstances. *See* 47 U.S.C. §534(a). A LPTV station that conforms to the rules established for LPTV in stations in Part 74 of the Commission's Rules will be considered "qualified" only if: 1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R. Part 73; 2) it adheres to Commission requirements regarding nonentertainment programming and employment practices;[3] 3) it complies with interference regulations consistent with its secondary status; 4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; 5) the community of license of the station and the franchise area of the cable system are both located outside the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and 6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system. *See* 47 U.S.C. §534(h)(2); 47 C.F.R. §76.55(d).

5. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act did not set a specific standard for either VHF or UHF low-power stations. However, §614(h)(1)(b)(iii) of the Communications Act of 1934, as amended, and the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, a standard of -49 dBm was set at a cable system's headend while a standard of -45 dBm was established for UHF commercial stations' signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we believe it is reasonable to utilize the same standards as prima facie tests to initially determine, absent other evi-

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[1] We note that §614(h)(2)(F) (47 U.S.C. 534) requires that "there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the *cable system*." (emphasis supplied.) LBC mistakenly refers to its community-of-license's county as having no full-power television station, however, a check of the Vandalia system's county indicates a similar result.

[2] LBC states that the *1993 Television and Cable Factbook* indicates that Capital has a channel capacity of 27 on its system, all channels of which are currently activated.

[3] Section 614(h)(2)(B) provides that the LPTV station must meet "all obligations and requirements applicable to television broadcast stations under Part 73 of Title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming: programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission [must] determine that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of geographic distance of such full power stations from the low power station's community of license." 47 U.S.C. §534(h)(2)(B); 47 C.F.R. §76.55(d).

dence, whether VHF or UHF low-power stations place adequate signal levels over a cable system's principal headend.

6. In this instance, Capital has determined W41BL's signal strength to be below the requisite level for a UHF commercial station. However, we find that the engineering data it used to support its determination is unacceptable. Generally, if the test results are less than -51 dBm for a UHF station, we believe that at least four readings must be taken over a two-hour period. Where the initial readings are between -51 dBm and -45 dBm, inclusive, we believe that the readings should be taken over a 24-hour period with measurements not more than four hours apart to establish reliable test results. This is the best evidence of the availability of a station at a subject system headend.

7. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, cable operators are expected to employ sound engineering measurement practices. Therefore, signal strength surveys should, at a minimum, include the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented;[4] and 4) weather conditions and time of day when test were done. When measured against these criteria, we conclude that the determination reached by Capital is insufficient to demonstrate that W41BL's signal is not of "good quality" at its system's headend.

8. We find that W41BL is a qualified low power television station and that it is entitled to carriage on the Vandalia, Brownstown and Ramsey, Illinois cable system. Accordingly, the complaint filed August 20, 1993, by Lightning Broadcasting Company IS GRANTED pursuant to §614(c) (47 U.S.C. §534(c)) of the Communications Act of 1934, as amended, and Capital Cable Partners IS ORDERED to commence carriage of low power television Station W41BL forty-five (45) days from the release date of this Order unless Capital submits within fifteen (15) days the engineering data required herein to support its assertion of poor signal quality from W41BL at Capital's principal headend. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

[4] It should be noted that a review of the engineering data submitted by Capital indicates that the anntena used for measurement and the height of the antenna in each instance departs widely from standard system practices.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Amendment of the	RM-8400
Commission's Rules To Establish	RM-8424
First and Second Class Radiotelephone Operator Licenses and Rename the General Radiotelephone Operator License as the Commercial Radiotelephone Operator License.	

ORDER

Adopted: May 13, 1994; Released: May 23, 1994

By the Acting Deputy Chief, Private Radio Bureau:

1. On September 21, 1993, Jim Wills (Wills) filed a petition (RM-8400) requesting that the Commission's Rules be amended to establish First and Second Class Radiotelephone Operator licenses. He argues that the First Class Radiotelephone Operator license would be more prestigious than the General Class Radiotelephone Operator license. Vern A. Weiss (Weiss) filed a related petition (RM-8424) on December 20, 1993. Weiss requests that the General Radiotelephone Operator license be renamed the "Commercial Radiotelephone Operator license" to avoid confusion between that license and the General Class Amateur Operator license. Wills filed the only comment on his petition. He proposes to grandfather operators licensed prior to June 15, 1984, and to "require that these licenses be held by anyone installing or repairing any devices that emit RF energy." We received no comments on Weiss's petition and no reply comments on either petition.

2. In a *Report and Order*[1] released July 8, 1981, the Commission eliminated the requirement that persons who install, maintain, repair or technically supervise the operation of transmitting equipment at broadcast stations hold First Class Radiotelephone Operator licenses. Because the Commission no longer required that license, its issuance was discontinued. Additionally, issuance of the Second Class Radiotelephone Operator license was discontinued. It was replaced with the General Class Radiotelephone Operator license, which had similar examination requirements. This class of license is required for operators of certain aviation, marine and International Fixed Public Radio stations.

3. A class of license for which the Commission has no requirement would not serve the public interest. Further, the Commission would incur significant administrative burdens, including the preparation of question pools. Therefore, we can find no identifiable public benefit from renaming the General Class Radiotelephone Operator license. In addition, if the proposal were implemented, the Commission would incur the administrative burdens involved in modifying its commercial operator license data base and the application form for commercial operator licenses (FCC Form 756). We, therefore, conclude that Weiss's proposal also is not in public interest.

4. Weiss also suggests changing the format of the license document issued to General Class Radiotelephone operators. The Commission's Rules do not specify license formats. Therefore, the suggested format change will not be considered in this proceeding.

5. In view of the foregoing, and pursuant to Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e), rule making petitions RM-8400 and RM-8424, filed by Wills and Weiss, respectively, to amend the amateur service rules do not warrant consideration by the full Commission and ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Acting Deputy Chief
Private Radio Bureau

[1] *An Inquiry Relating to the Commission's Radio Operator Licensing Program*, 87 FCC 2d 44 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: August 4, 1993

US WEST, COPPER VALLEY, MIDVALE, AND TABLE TOP FILE JOINT PETITION FOR WAIVER OF STUDY AREA DEFINITION (PART 36 APPENDIX-GLOSSARY) AND PRICE CAP "ALL OR NOTHING" RULE (SECTION 61.41(c) AAD 93-93

Comment Date: September 7, 1993
Reply Date: September 28, 1993

On July 23, 1993, US West Communications, Inc. (US West), Copper Valley Telephone Company (Copper Valley), Midvale Telephone Exchange (Midvale) and Table Top Telephone Company (Table Top) filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the parties to reflect the changes in their study area boundaries that would result from the sale from US West to these parties of eleven exchanges in Arizona. Copper Valley, Midvale, and Table Top also seek waivers of the price cap rules at Sections 61.41(c) and (d) and, if needed, 69.3(e)(11), to exempt them from the price cap "all or nothing" rule and allow them to continue to operate as cost companies in the NECA common line and traffic sensitive pools. The parties state that this transaction is currently pending before the Arizona Corporation Commission.

Parties may file comments on this petition no later than September 7, 1993. Replies should be filed by September 28, 1993. Comments should reference AAD 93-93. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from ITS.

For further information contact Jacky Spindler at (202) 634 1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-47

In re Applications of

Benchmark Communications Corporation (hereafter "Benchmark")	File No. BPH-891228MT
Hap-Hazard Broadcasting Company) (hereafter "Hap-Hazard")	File No. BPH-900314MM (PREVIOUSLY DISMISSED)
Larry A. Payne (hereafter "Payne")	File No. BPH-900315MH (PREVIOUSLY DISMISSED)

For Construction Permit for a New FM Station on Channel 291C3 in Chatom, Alabama

HEARING DESIGNATION ORDER

Adopted: May 9, 1994; Released: May 23, 1994

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned applications for a new FM station.[1]

2. *Background.* The subject allotment is intimately intertwined with the history of Station WCCJ(FM), Chatom, Alabama. The original construction permit for a new FM station on Channel 276A[2] in Chatom, Alabama, (BPH-840423IL) was issued to June G. Fuss on October 23, 1984, specifying a construction completion date of October 23, 1985. On June 17, 1985, the Commission granted the application (File No. BAPH-850215HK) to assign the permit of then station WDAL(FM) from Ms. Fuss to Benchmark. Benchmark received its first extension of construction permit on November 18, 1985, to expire on May 18, 1986. On April 11, 1986, Benchmark filed a counterproposal in a pending Commission rulemaking proceeding requesting that its allotment be upgraded from its current Class A to Class C2 facilities. *See* MM Docket No. 86-55, RM 5400, 51 Fed. Reg. 6442 (February 24, 1986). On October 6, 1987, Benchmark received its second extension (BMPH-860417JG), through April 6, 1988, based on the pending rulemaking proceeding.

3. On March 25, 1988, Benchmark applied for a third extension of the now WCCJ permit. Alabama Native American Broadcasting Company filed an objection to that extension application on May 6, 1988. The Commission requested additional information from Benchmark regarding the progress it claimed to have made toward constructing WCCJ by letter dated July 20, 1988 (reference 8920-SL), and ultimately denied the extension request and cancelled the permit for failure to comply with the strict requirements of 47 C.F.R. §73.3534. In so doing, however, the Chief, Audio Services Division, opined that:

> We must also point out, however, that there appear to be several misrepresentations with respect to construction progress made by Benchmark in this case. Specifically, while Benchmark claimed in its March 25 application that a tower and mobile home to be used for studios and offices were on site with equipment installation progressing, these statements appear to be untrue. There is still no tower at the site, and no trailer arrived at least until (by Benchmark's own admission) May 16, 1988. Additionally, Benchmark claimed that the power company had begun installing a service line to the site, when no such line is in place yet, over nine months after the claim was made. We remind Benchmark that truthfulness is a key element of character necessary to operate a broadcast station in the public interest. *See In the Matter of Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part*, 1 FCC Rcd 421 (1986). *See also FCC v. WOKO,Inc.*, 329 U.S. 223 (1946), and *LeFlore Broadcasting Company, Inc. v. FCC*, 636 F.2d 454 (D.C. Cir. 1980). However, given the denial of the subject extension application and consequent cancellation of the WCCJ(FM) construction permit, we do not believe that further action is warranted at this time.

Letter to Benchmark Communications Corporation, reference 8920-MW (Chief, Audio Services Division, January 19, 1989). Benchmark filed a timely petition for reconsideration of this action on March 1, 1989.

4. During the pendency of the petition for reconsideration, the Commission's Policy and Rules Division finalized MM Docket No. 86-55. In the *Report and Order* in this proceeding, 4 FCC Rcd 7556 (1989), the Chief, Policy and Rules Division, wrote that

> We will not consider the Benchmark counterproposal to upgrade its Channel 291A construction permit to operate on Channel 290C2. On January 19, 1989, the Audio Services Division cancelled Benchmark's underlying construction permit for Channel 291A at Chatom. As a consequence of that cancellation, Benchmark is no longer eligible to request modification of its construction permit. Moreover, in the Joint Supplemental Comments filed June 23,

[1] The applications of Hap-Hazard and Payne were dismissed on June 26, 1991. *See Letter to John R. Meyers, et al.*, reference 8920-CA (Chief, Audio Services Division, June 26, 1991.) Hap-Hazard filed a petition for reconsideration of its Dismissal on July 26, 1991, and Payne filed a similar petition on August 2, 1991. Additionally, Hap-Hazard filed a petition to deny Benchmark's application on April 11, 1991. Benchmark filed an opposition to the petition on April 25, 1991, to which Hap-Hazard replied on May 13, 1991.

[2] In order to accomodate another station's upgrade, the Commission eventually substituted Channel 291A at Chatom. *See* RM 4929, MM Docket No. 85-387.

1989, Benchmark agrees not to pursue the Channel 290C2 allotment. Instead, Benchmark states its willingness to apply for a Channel 291C3 allotment at Chatom as a "new facility."

The *Report and Order* subsequently announced that the filing window for the Channel 291C3 allotment at Chatom would open on December 1, 1989, and close on January 2, 1990. Benchmark timely filed the instant application on December 28, 1989. However, rather than dismiss the pending petition for reconsideration of the cancellation of the WCCJ permit, Benchmark filed the application as a "minor change" to the WCCJ construction permit to implement the rulemaking (*i.e.*, to upgrade from Class A to Class C3 pursuant to MM Docket No. 86-55). Benchmark also noted on page 1 of its application that "[s]hould pending File No. BMPH-880325JC not be granted, applicant requests that this be treated as an application for a new station." Benchmark ultimately requested dismissal of its petition for reconsideration on June 21, 1990, only after it was assured that no applicants had filed for the Channel 291C3 allotment in Chatom during the filing window announced in MM Docket No. 86-55.

5. *The Petitions for Reconsideration.* The applications of Hap-Hazard and Payne were dismissed by the Chief, Audio Services Division, on June 26, 1991, because they were filed *after* the close of the Chatom filing window and because Benchmark had filed its application, however characterized, within that window. Therefore, because "timely filed applications preclude use of the 'first-come, first-serve' processing system," *see Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19,936, 19,941 (May 13, 1985), Hap-Hazard's and Payne's proposals were dismissed as unacceptable for filing. *See Letter to John R. Meyers et al.*, reference 8920-CA, (Chief, Audio Services Division, June 26, 1991).

6. In its petition for reconsideration, Hap-Hazard argues that the June 26, 1991 letter "completely ignored" the petition to deny it filed against Benchmark's application which "raised a number of questions about the acceptability of Benchmark's application and, additionally, about Benchmark's basic qualifications to be a Commission licensee." Petition, at 2. Essentially, Hap-Hazard states that Benchmark's application "sought a modification of a construction permit which was not, at the time the application was filed, still outstanding" and that therefore the application should have been dismissed.[3] Additionally, Hap-Hazard argues that basic qualifying issues relating to Benchmark's efforts and representations in constructing WCCJ have not been resolved.[4] Hap-Hazard notes that the failure to resolve these character qualifications issues indicates that Benchmark's application must be designated for hearing on those issues before its proposal can be granted. Hap-Hazard indicates that "it does not believe that the public interest will be served by any further dissipation of scarce Commission resources on Benchmark." Petition, at 4.[5]

7. Payne indicates in its petition for reconsideration that, if the character issues outstanding against Benchmark remained unresolved, "Payne and Hap-Hazard, who filed in good faith, will be eliminated while Benchmark becomes a permittee with serious unresolved issues." Payne Petition, at 3. Payne also states that he relied on the Commission's data base and certain trade publications before filing his application, and these indicated that there were no applications on file for the Chatom frequency. Payne apparently believed that he was filing a risk-free application. Payne states that "the Commission acted in haste in dismissing the Payne and Hap-Hazard applications before the Benchmark issues in question are resolved."[6]

8. We believe that petitioners are incorrect in their legal and equitable arguments challenging the acceptance of Benchmark's application. Initially, Hap-Hazard claims that Benchmark's application cannot be accepted because it proposes a minor change to a permit which was not outstanding. Legally, however, this is not true. Benchmark had filed a timely petition for reconsideration of the denial of its extension and cancellation of its permit, and it had every right to prosecute that petition. Until the appeal was ruled upon, the denial and cancellation were not final Commission actions. *See, e.g., Meridian Communications,* 2 FCC Rcd 5904 (Rev. Bd. 1987), and *Word of Life Ministries, Inc.*, 3 FCC Rcd 2060 (Rev. Bd. 1988).[7] Furthermore, while Benchmark may have been guilty of legal legerdemain in retaining its petition for reconsideration while filing the instant application and requesting that it be considered as an application for a new FM station only if the extension is ultimately denied,[8] we assure Hap-Hazard that no benefit would accrue to Benchmark from this plan. Were any applications filed during the filing window for the new Chatom allotment, they would have been consolidated with the Benchmark application, however it was characterized, and, if acceptable, designated for comparative hearing.

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[3] Hap-Hazard notes the language on Page 1 of the application that the application should be treated as an application for new FM station only if the pending extension request was not granted. Hap-Hazard argues that, if Benchmark had dismissed its petition for reconsideration on or before December 28, 1989, there would be no problem. However, it states that "Benchmark chose to engage in gamesmanship apparently designed to permit it to block competition if the denial of its extension application were to be reconsidered, while still attempting to assure itself of consideration if reconsideration were denied." Petition to Deny, at 6. Benchmark, claims Hap-Hazard, "should not be permitted to benefit from its subterfuge." *Id.*

[4] Hap-Hazard argues in its petition to deny that Benchmark also attempted to cover these outstanding character issues by providing at best a "vague, cursory and misleading summary." Petition to deny, at 8.

[5] We will address Hap-Hazard's character allegations *infra*, during our discussion of Benchmark's proposal.

[6] Payne notes that "there is a very good possibility that the Commission ... will disqualify the Chatom application of Benchmark...." Payne states that the seven-day, first-come/first-serve filing window proposed in the June 26 dismissal letter for this eventuality would be "extremely unfair" to Payne and Hap-Hazard, who have spent several thousand dollars in legal, engineering and filing fees, "based on incorrect information."

[7] Additionally, under 47 C.F.R. §1.65, an application is "pending" before the Commission from the time it is accepted for filing ... until a Commission grant or denial is no longer subject to reconsideration by the Commission or to review by any court." Thus, Benchmark's extension application was still technically pending before the agency when the instant application was filed.

[8] The rulemaking *Report and Order* contains no indication that Benchmark indicated in its June 23, 1989 comments in that proceeding that it would withdraw its petition for reconsideration. Rather, it states simply that Benchmark "agrees not to pursue" the upgrade specified in its counterproposal. 4 FCC Rcd at 7556.

9. However, no other applications were filed during that window. Hap-Hazard and Payne both chose to wait until the close of the window before filing. Payne especially should now be aware of the risks of so doing: even if Benchmark's proposal were to be dismissed, we would not consider Payne's application, but would instead open a seven-day "mini-window," as indicated in the June 26 dismissal letter. Equitable considerations do not favor latecomers. While Benchmark's December 28 application may not have been entered into the Commission's database and processed with alacrity, both Hap-Hazard and Payne could have solidified their rights simply by filing during the pertinent filing window.

10. Finally, Payne's argument that it filed only after consulting the Commission's database and several unnamed external trade publications is misguided. The Commission has held that its database is an unofficial source of information (as are external trade publications) which should not be relied upon by applicants attempting to determine their filing rights. *See, e.g., State of Oregon Acting By and Through the State Board of Higher Education*, 8 FCC Rcd 3558, 3560 (1993). Therefore, the fact that Payne did not know of Benchmark's application is not persuasive.

11. In light of the above discussion, the petitions for reconsideration filed by Hap-Hazard and Payne will be denied below to the extent that they challenge the acceptance of Benchmark's application on procedural grounds. Moreover, we do not believe that an abuse of process issue is warranted against Benchmark for attempting to prosecute simultaneously both its petition for reconsideration and its December 28 application.[9] The *Report and Order* in MM Docket 86-55 indicates that Benchmark informed the Commission's Policy and Rules Division that it would pursue the Channel 291C3 Chatom allotment as a new station; it did not do so, but rather pursued it as a modification until assured that it would face no mutually exclusive competition. While we do not believe that Benchmark engaged in a good-faith utilization of Commission processes, because no applications were filed during the Chatom Channel 291C3 filing window, we believe that an evidentiary hearing on this issue is pointless.[10]

12. *Benchmark's application.* As stated in the June 26, 1991 letter, Benchmark's application meets the Commission's legal and technical criteria and was properly found to be acceptable for filing. However, due to the unresolved matters arising out of its representations and efforts *vis-a-vis* WCCJ, additional concerns remain regarding Benchmark's basic qualifications to be a Commission licensee. The January 19, 1989 letter denying Benchmark's third extension and cancelling the WCCJ permit indicated that Benchmark appeared to have made several misrepresentations with respect to construction progress, but that no further action was warranted due to cancellation of the WCCJ permit. However, on May 4, 1989, Benchmark filed an application (File No. BPH-890504ME) for a new FM station in Highlands, North Carolina. The WCCJ construction matters were raised in that proceeding, and the following issues were designated against Benchmark:

> 1. (a) To determine, in connection with the matters discussed in paragraph two, above, whether Benchmark made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission, or attempted to deceive or mislead the Commission;
>
> (b) To determine, in light of the evidence adduced pursuant to issue (a) above, whether Benchmark possesses the basic qualifications to be a Commission licensee.

Mountain High Broadcasters, Inc., 6 FCC Rcd 3 (M.M. Bur. 1991). Based upon the specification of these issues, the Chief, Audio Services Division, stated in the June 26, 1991 letter that action on Benchmark's Chatom application would be held in abeyance pending determination of its basic qualifications in the Highlands proceeding.[11] Regrettably, Benchmark had previously declined to participate in the Highlands proceeding, and its application was dismissed for failure to prosecute. *Memorandum Opinion and Order*, FCC 91M-1391, Mimeo No. 4019 (Judge Joseph P. Gonzalez, April 23, 1991). Thus, there will be no resolution of the specified issues in the Highlands proceeding. Since the issues remain unanswered, they will be specified and tried in this proceeding.[12]

13. One additional character matter must be addressed. Benchmark submitted the following discussion of the WCCJ construction permit in Exhibit I to its application:

> [Benchmark] was granted a transfer of ownership of the construction permit for WCCJ... Unable to complete construction before its last permit expired, Benchmark filed for an extension to its construction permit in a timely manner. However, certain events that were to have taken place between the time the application was prepared and filed and the expiration of the construction permit failed to materialize. A party disinterested in the existing authorization but

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[9] Benchmark's proposal cannot be considered a "contingent application" under 47 C.F.R. §73.3517 or an inconsistent application under 47 C.F.R. §73.3518. Processing of the application is not conditioned upon or inconsistent with action on any other proposal: we could consider the application irrespective of whether or not the petition for reconsideration of the cancellation of the WCCJ permit was granted. It is simply the characterization of the application which Benchmark makes contingent.

[10] Were any mutually exclusive applications filed during that window, however, such an issue may have been appropriate. Benchmark prosecuted its petition for reconsideration only until it was assured that it would face no competition for the Channel 291C3 facility. Such action appears to be designed to frustrate and obstruct the prosecution of competing applications. *See, e.g., Rocket radio, Inc.*, 35 RR 2d 399, 405 (Rev. Bd. 1975).

[11] This holding was made pursuant to *Policy Regarding Character Qualifications of Broadcast Licensees, supra*, 102 FCC 2d at 1225, which states that when an application is set for hearing on character issues and the applicant has no other stations, the Commission may make any subsequent applications subject to the outcome of the pending proceeding.

[12] In the pleadings responsive to Hap-Hazard's petition to deny -- Benchmark's opposition and Hap-Hazard's reply -- the parties attempt to re-litigate the issues surrounding construction of WCCJ and Benchmark's representations regarding that construction. Because we must specify the unresolved issues relating to those matters for hearing here, we will not consider the these arguments.

> mutually exclusive to a pending upgrade request alleged that a misrepresentation had occurred when Benchmark indicated that events reported in its application for additional time had taken place when they had not. Benchmark believed these events would be completed by the end of the existing construction period. When they did not occur, Benchmark immediately amended the application and stated the nature of the discrepancies and the steps it took to correct them. Without reaching the allegations of misrepresentation, the Commission denied the extension application for lack of adequate construction progress. Benchmark has requested reconsideration of that action.

In its original petition to deny Benchmark's application, Hap-Hazard states that this synopsis is "vague, cursory and misleading." While we agree that Benchmark's submission does not properly characterize the Audio Services Division's January 19, 1990 letter -- the misrepresentation allegations were considered, although no action was taken because the permit was cancelled -- we do not believe that the mischaracterization itself amounts to an additional attempt at misrepresentation. However, under 47 C.F.R. §1.65, applicants are responsible "for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application." Benchmark clearly failed to comply with this requirement because, *inter alia*, it did not amend its Chatom proposal to indicate either (i) the specification of the issues in the Highlands proceeding, or (ii) the dismissal of its Highlands application without resolution of the issues specified therein. Irrespective of whether or not the staff discovered this important information, we believe that Benchmark's overall conduct raises a substantial and material question of fact concerning whether or not it attempted to conceal data of decisional significance from the Commission. Accordingly, appropriate issues will be specified.

14. *Other matters.* Benchmark proposes to mount its transmitting antenna on a new tower. Pursuant to PST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," when work is to be performed on the tower, the transmitter power must be reduced or completely eliminated to comply with FCC guidelines. Accordingly, any subsequent grant of Benchmark's application will be subject to the following condition:

> The permittee/licensee must reduce power or cease operation as necessary to protect persons having access to the site, tower, or antenna from radiofrequency radiation in excess of FCC guidelines.

15. Except as may be indicated by any issues specified below, the applicant is qualified to construct and operate as proposed. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, Benchmark's application IS DESIGNATED FOR HEARING IN A PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine, in connection with the construction of WCCJ(FM), Chatom, Alabama, and with the representations made on those matters in the instant application, whether Benchmark made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission, or attempted to deceive or mislead the Commission;
>
> 2. To determine whether Benchmark violated Section 1.65 of the Commission's Rules and or lacked candor, by failing to report the designation of character issues against it in the Highlands, North Carolina proceeding and/or the dismissal of its application for that frequency with unresolved character issues pending;
>
> 3. To determine, from the evidence adduced pursuant to Issues 1 and 2 above, whether Benchmark possesses the basic qualifications to be a licensee of the facilities sought herein.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, whether the subject application should be granted.

16. IT IS FURTHER ORDERED, That the petitions for reconsideration filed by Hap-Hazard and Payne ARE DENIED.

17. IT IS FURTHER OREDERED, That the petition to deny Benchmark's application, filed on April 11, 1991 by Hap-Hazard, IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the day of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communication Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicant herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issue specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Docu-

ment Production Order (see section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990), *on reconsideration*, FCC 91.154, paras. 7-8 & n.3, Appendix paras. 3 & 5, released May 15, 1991.

21. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Linda B. Blair, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Liberty Cable Company, Inc. v. Courtroom Television Network	CSR-4242-P

Program Access Complaint

ORDER

Adopted: March 25, 1994; Released: May 23, 1994

By the Chief, Cable Services Bureau:

1. On November 12, 1993, Time Warner Cable ("TWC") filed with the Commission a Petition for Exclusivity (CSR-4231-P), pursuant to Section 628(c)(2)(D) of the Communications Act of 1934, as amended, 47 U.S.C. § 548(c)(2)(D), and 47 C.F.R. §§ 76.1002(c)(4),(5).[1] In its petition, TWC requests that the Commission find that TWC's exclusive contracts with Court TV and Prime Ticket Network are in the public interest and therefore not prohibited under 47 C.F.R. § 76.1002(c)(2).

2. On December 9, 1993, Liberty Cable Company, Inc. ("Liberty") filed a complaint (CSR-4242-P) against Courtroom Television Network ("Court TV"), alleging that Court TV has violated Section 628 of the Communications Act, 47 U.S.C. § 548(c)(2)(D), and Section 76.1002 of the Commission's rules, 47 C.F.R. § 76.1002(c)(2), because Court TV refuses to provide its programming to Liberty for distribution on Liberty's Satellite Master Antenna Television ("SMATV") system in New York.

3. On December 23, 1993, Court TV filed a Motion to hold the Complaint in abeyance pending Commission action on TWC's Petition for Exclusivity. Also on December 23, 1993, TWC filed a letter supporting Court TV's Motion to hold the Complaint in abeyance. On January 5, 1994, Liberty filed an opposition to Court TV's Motion.

4. Subsequent to a meeting with staff of the Cable Services Bureau, TWC filed, on March 14, 1994, a request that its initial joint Petition regarding exclusive contracts with both Court TV and Prime Time Network be withdrawn, and substituted it with a new Petition for Exclusivity with Court TV.[2] Also on March 14, 1994, Court TV filed a Renewed Motion to hold Liberty's Complaint in abeyance pending the resolution of TWC's Petition for Exclusivity.

5. We find that the Commission's resolution of Liberty's Complaint necessarily involves a determination regarding whether TWC's exclusivity with Court TV is in the public interest and thus permissible under the 1992 Cable Act. Because this question is precisely the issue raised by TWC's Petition for Exclusivity, we believe that our administrative resources are best utilized by avoiding duplicative analysis, and we conclude that TWC's Petition should be considered first.

6. In view of the above, the Motion to hold in abeyance the Complaint of Liberty Cable Company, Inc. against Courtroom Television Network (CSR-4242-P), pending the resolution of Time Warner Cable's Petition for Exclusivity with Court TV (CSR-4231-P) IS GRANTED. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Alexandra M. Wilson
Acting Chief, Cable Services Bureau

[1] We note that the initial Petition was not placed on public notice because TWC sought confidentiality with respect to certain information contained in the Petition.

[2] TWC has indicated that it intends to file its additional, separate petition for exclusivity regarding Prime Ticket Network at a later date.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-38

In the Matter of

Amendment of Section 73.606(b), RM-8451
Table of Allotments,
TV Broadcast Stations.
(Sioux City, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 21, 1994; Released: May 24, 1994

Comment Date: July 8, 1994
Reply Comment Date: July 25, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Independent Communications, Inc. ("petitioner"), requesting the allotment of UHF Channel 39 to Sioux City, Iowa, as an additional television service. Petitioner states that it will apply for Channel 39, if allotted.

2. We believe the public interest would be served by proposing the allotment of UHF Channel 39 to Sioux City since an interest has been expressed in providing the community with an additional local TV service. Channel 39 can be allotted to Sioux City consistent with the minimum distance separation requirements of Sections 73.610 and 73.698 of the Commission's Rules without the imposition of a site restriction.[1] Although the Commission has imposed a temporary freeze on new television allotments in certain metropolitan areas, the proposed allotment at Sioux City is not affected.[2]

3. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sioux City, Iowa	4-, 9, 14, *27-	4-, 9, 14, *27-, 39+

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 8, 1994**, and reply comments on or before **July 25, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dennis R. Begley, Esq.
Reddy, Begley & Martin
Suite 350
Washington, D.C. 20037
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 39 at Sioux City are North Latitude 42-29-30 and West Longitude 96-23-30.
[2] *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, published July 29, 1987.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-320

In the Matter of

Amendment of Section 73.202(b), RM-8407
Table of Allotments,
FM Broadcast Stations.
(Ellison Bay, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 21, 1994; Released: May 24, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 9 FCC Rcd 121 (1994), issued in response to a petition filed by Eden Broadcast Group ("petitioner"), proposing the allotment of Channel 223A to Ellison Bay, Wisconsin, as that community's first local broadcast service. Petitioner submitted late-filed comments reiterating its intention to apply for the channel, if allotted.[1] No other comments were received.

2. In the *Notice*, petitioner was requested to furnish sufficient information to support a finding that Ellison Bay is a community for allotment purposes since it is not listed in the U.S. Census. Petitioner was requested to provide specific information as to the social, economic, cultural or governmental indicia to determine whether Ellison Bay is a community for allotment purposes. In response, petitioner states that the Village of Ellison Bay, in the Town of Liberty Grove, has a post office, several gift shops, two supper clubs, a marina, grocery store, clothing store and furniture store, two men's clubs and a woman's club and a branch bank. Petitioner notes that with the exception of the branch bank, all the businesses are open year round. Further, petitioner states that Ellison Bay is part of the division four Gibraltar Area School system with schools located in Fish Creek and Washington Island.

3. Based on the totality of the evidence submitted by petitioner, we believe it has failed to establish that Ellison Bay qualifies as a community for allotment purposes and therefore it would not serve the public interest to allot a channel. *See Mokelumme Hill, California*, 4 FCC Rcd 7108 (1989). While petitioner has alleged that there are some local businesses, churches and schools, it has not specifically identified these entities with addresses or shown that they are intended to serve Ellison Bay, as opposed to other areas. This is a critical deficiency because, in past cases, we have rejected claims of community status where a nexus has not been shown between the political, social and commercial organizations and the community in question. *See Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991), and cases cited therein. We note that Ellison Bay can be located on a state map and according to the *1994 Rand McNally Commercial Atlas*, Ellison Bay has a post office and population of 370 people. However, we believe that the record in this proceeding is insufficient to find that Ellison Bay is a community for allotment purposes. Therefore, we will not allot Channel 223A to Ellison Bay, Wisconsin.

4. IT IS FURTHER ORDERED, That the request of Eden Broadcast Group for the allotment of Channel 223A to Ellison Bay, Wisconsin (RM-8407) IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In conformance with the Commission's general policy of accepting late-filed comments where the proceeding is uncontested, we will accept petitioner's comments for the purpose of permitting a continuing expression of interest in Channel 223A at Ellison Bay. *See, Santa Isabel, Puerto Rico*, 3 FCC Rcd 2335 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Telephone Co. Inc. of Raleigh
Raleigh, North Carolina — NAL/Acct. No. 415HF0006

Liability for Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: May 18, 1994; Released: May 19, 1994

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for monetary forfeiture (NAL) issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. § 503(b), to Telephone Co. Inc. of Raleigh (TCIR) for the willful violation of Section 2.946 of the Commission's Rules, 47 C.F.R. § 2.946, failing to comply with the Commission's request for data and information concerning the marketing of equipment, capable of causing radio frequency interference, subject to the provisions of Section 302 of the Act, 47 U.S.C. § 302 and Section 2.803 of the Commission's Rules. 47 C.F.R. § 2.803.

2. The appropriate amount of forfeiture for this violation is $4,000.

II. BACKGROUND

3. On May 20, 1993, the Commission's Technical Standards Branch, Office of Engineering and Technology, sent a letter to TCIR inquiring about their marketing of a voice mailbox computer peripheral (installs in an 8-bit expansion slot) labelled with an invalid FCC identification number, (FCC ID: F25VM-328). The letter was received by TCIR on June 5, 1993, as evidenced by a signed receipt for certified mail. The letter requested a response within 30 days from the date of receipt.

III. DISCUSSION

4. TCIR has failed to respond to the Commission's letter of inquiry. Section 2.946 of the Commission's Rules provide for a forfeiture penalty pursuant to Section 1.80 of the Commission's Rules for failing to provide data on request about the marketing of a product subject to the Commission's marketing regulations.

5. Pursuant to the Commission's forfeiture policy[1] the base forfeiture amount for failure to respond to Commission communications is $4,000. In addition, this amount appears appropriate under Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(b) of the Commission's Rules, 47 C.F.R. § 1.80(b). No adjustments to this amount appear to be warranted under the circumstances.

6. The violation was willful. Section 312(f)(1) of the Act, which also applies to Section 503(b), provides: The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 (b) of the Commission's Rules, 47 C.F.R. § 1.80(b), that Telephone Co. Inc. of Raleigh IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of four thousand dollars ($4,000) for failure to respond to Commission communications in violation of Section 2.946 of the Commission's Rules, 47 C.F.R. § 2.946. The forfeiture amount specified was determined after consideration of the factors set forth in Section 503(b) of the Act, 47 U.S.C. § 503(b).

8. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that Telephone Co. Inc. of Raleigh shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[2] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The NAL/Acct. No. 415HF0006 should be written on the check. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Chief, Legal Branch, FOB, NAL/Acct. 415HF0006
Stop Code 1500E3
1919 M Street, N.W.
Washington, DC 20554

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[1] *See Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993).

[2] Claims of inability to pay should be supported by tax returns or other financial statements for k+ the most recent three years.

9. IT IS FURTHER ORDERED that this notice shall be sent by certified mail, return receipt requested, to Telephone Co. Inc. of Raleigh.

FEDERAL COMMUNICATIONS COMMISSION

Lauren J. Belvin
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 93-253

In the Matter of

Implementation of Section 309(j)
of the Communications Act --
Competitive Bidding

FOURTH REPORT AND ORDER

Adopted: April 20, 1994; Released: May 10, 1994

By the Commission:

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I. INTRODUCTION

1. On March 8, 1994, the Commission adopted a Second Report and Order in this proceeding (Second Report and Order)[1] establishing general rules and procedures governing competitive bidding for radio spectrum (auctions). The Second Report and Order identified the types of services and licenses that may be subject to auctions, described a menu of competitive bidding methods, and adopted generic auction procedures. The Commission stated that specific competitive bidding rules for licensing individual services would be addressed in subsequent Reports and Orders. This Fourth Report and Order establishes rules and procedures for auctioning licenses in the Interactive Video and Data Service (IVDS).[2]

2. In this Fourth Report and Order, we find that the value of IVDS licenses is not expected to be sufficiently high to justify the use of simultaneous multiple round bidding. We therefore conclude that the auction methods most appropriate to the IVDS are oral bidding (open outcry) and single round sealed bidding. We also establish rules and procedures to deter possible abuses of the bidding and licensing procedures. Last, we establish preferences for small businesses and businesses owned by minorities or women to enhance their participation in the competitive bidding process and in the provision of IVDS system offerings.

II. BACKGROUND AND AUCTION ELIGIBILITY

3. The IVDS is a point-to-multipoint, multipoint-to-point, short distance communications service in which licensees may provide information, products, or services to individual subscribers located at fixed locations in the service area, and subscribers may provide responses.[3] The rules governing IVDS were adopted in 1992 in Gen. Docket No. 91-2.[4] In that proceeding, the Commission decided to define specific service areas and license IVDS channels in these areas on an exclusive basis. As so defined, the IVDS has 734 service areas, with two licenses of 500 kilohertz each (218.0-218.5 and 218.5-219.0 MHz) available

[1] Second Report and Order in PP Docket No. 93-253, FCC 94-61, released April 20, 1994 (Second Report and Order). On February 3, 1994, we adopted the First Report and Order in this proceeding, which, pursuant to 47 U.S.C. § 309(i)(4)(C), prescribed transfer disclosure requirements with respect to licenses or permits awarded by random selection. First Report and Order in PP Docket No. 93-253, FCC 94-32 (released February 4, 1994), petitions for reconsideration pending.

[2] Concurrent with this Fourth Report and Order, we are adopting a Third Report and Order, FCC 94-98, in this docket addressing the specific competitive bidding rules and procedures for "narrowband" Personal Communications Services (PCS).

[3] Service offerings might include subscriber opportunities to provide real-time responses to educational and pay-per-view programming, commercial data applications such as home banking, and the downloading of data. *See* Report and Order in Gen. Docket No. 91-2, 7 FCC Rcd 1630, 1630 ¶ 2, 1637 ¶ 54 (1992).

[4] Report and Order, *supra* note 3; *see* 47 C.F.R. Part 95, Subpart F.

in each area.[5] In the event of mutually exclusive applications[6] for license, the Commission decided in that earlier proceeding to use the lottery processes specified in our rules.[7]

4. The Omnibus Budget Reconciliation Act of 1993 (Budget Act)[8] added a new Section 309(j) to the Communications Act of 1934, as amended (Communications Act),[9] to permit the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive accepted applications for initial license. In the Notice of Proposed Rule Making in this proceeding, we stated that "the principal use of IVDS-allocated spectrum is reasonably likely to involve the licensee receiving compensation from subscribers for communications services," and therefore proposed to subject IVDS to competitive bidding.[10] Following our subsequent review of comments and reply comments, we concluded that IVDS should be subject to auctions.[11] In this Fourth Report and Order we have attempted to design IVDS auction rules and procedures that meet Congressional objectives.[12] We believe that these objectives are embodied in two basic Commission policy goals: promoting economic growth, and enhancing access to telecommunications service offerings for consumers, producers, and new entrants.[13]

III. COMPETITIVE BIDDING DESIGN

5. As noted, we have determined that mutually exclusive IVDS applications are subject to auctions. We must, therefore, identify the methodology and procedure we will use to auction the licenses. We do so in the paragraphs below, pursuant to Section 309(j)(3) of the Communications Act and based on the record in this proceeding.[14] As described below, some further details about specific competitive bidding procedures will be provided later by Public Notice(s).[15]

A. General Competitive Bidding Designs

6. The Second Report and Order established the criteria to be used in selecting the auction design method for each auctionable service. Generally, we concluded that awarding licenses to those parties that value them most highly will foster Congress' policy objectives. In this regard, we noted that because a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of the license to that bidder, an auction design that awards licenses to those bidders who are willing to pay the highest bid tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum.

7. We concluded that where the licenses to be auctioned are interdependent (that is, either substitutes for, or complements to, each other) and their value is expected to be high, "simultaneous multiple round" auctions would best achieve the Commission's goals for competitive bidding.[16] We also noted that simultaneous multiple round bidding is more complex for bidders and may be administratively more expensive than other auction methods we may select, and indicated that we would use this design only in instances where the expected value of the licenses to be auctioned is high relative to the costs of conducting a simultaneous multiple round auction.[17]

8. In the Second Report and Order we stated our intention to tailor the auction design to fit the characteristics of the licenses to be awarded. We noted that simultaneous multiple round auctions may not be appropriate for all licenses.[18] The less the interdependence among licenses, the less the benefit to auctioning them simultaneously. To the extent that simultaneous auctions are more costly and complex to run, we indicated that we may choose a sequential auction design, including sequential oral auctions, when there is little interdependence among individual licenses.

9. We further explained that when the values of particular licenses to be auctioned are low relative to the costs of conducting a simultaneous multiple round auction, we may consider auction designs that are relatively simple,

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[5] *See* 47 C.F.R. §§ 95.803, 95.853. IVDS service or market areas are defined in terms of the 734 cellular system service areas. *See* Public Notice, Report No. 92-40, released January 24, 1992; 47 C.F.R. § 22.903 (cellular). Many of these service areas cover rural or remote, sparsely populated areas.

[6] The Commission, in general, "considers two or more applications to be mutually exclusive' if their conflicts are such that the grant of one application would effectively preclude, by reason of harmful electrical interference, the grant of one or more of the other applications." Second Report and Order at ¶ 12 n.5.

[7] *See* 47 C.F.R. § 1.972 (1992). On September 15, 1993, a lottery for nine IVDS markets was conducted. This lottery was permitted under the Budget Act described below, the pertinent applications having been accepted for filing by the Commission prior to July 26, 1993. *See* Budget Act, *infra* note 8, § 6002(e).

[8] Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993)(Budget Act); *see* H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 480-89 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 1169-78.

[9] 47 U.S.C. §§ 151-713.

[10] 8 FCC Rcd 7635, 7659 ¶ 143 (1993); *see generally* 47 U.S.C. § 309(j)(2).

[11] Second Report and Order at ¶ ¶ 49-53.

[12] 47 U.S.C. § 309(j)(3).

[13] Second Report and Order at ¶ ¶ 3-7.

[14] We received comments or reply comments on auctioning licenses in the IVDS from the following: American Group (American); Quentin L. Breen (Breen); Chase McNulty Group, Inc. (Chase); EON Corporation (EON)(*ex parte* filings); Independent Cellular Consultants (ICC); Andrea L. Johnson (Johnson); Kingswood Associates (Kingswood); NYNEX Corporation (NYNEX); Radio Telecom and Technology, Inc. (RTT); Harry Stevens, Jr. (Stevens); and Richard L. Vega Group (RLV). Of these, five -- American (reply comment at 23-25), Kingswood (reply comment at 23-25), NYNEX (comment at 11), Stevens (reply comment at 1), and RLV (comment at 11-14) -- commented in this context only on whether IVDS should be subject to auctions, an issue we addressed in the Second Report and Order. *See* ¶ 3, *supra*.

[15] The Public Notice(s) will be issued by either the Commission or the Private Radio Bureau.

[16] *See* Second Report and Order at ¶ ¶ 106-111. With this method, all licenses or classes of licenses are auctioned at once, using multiple rounds, and the bidding continues until bidding activity subsides. Thus, bidders may repeatedly "top" the previously high bids. *See id.* at ¶ ¶ 82, 86.

[17] *Id.* at ¶ 111.

[18] *Id.* at ¶ 112.

with low administrative costs and minimal costs to the auction participants. We noted that as the value of licenses decreases, and thus the benefits of simultaneous multiple round bidding diminish relative to the cost and complexity of such auctions, a less complex auction method may be more suitable. For example, with large numbers of low value licenses we noted that we may decide that it is preferable to implement a low cost auction method such as single round sealed bidding to minimize cost and expedite the licensing process.

10. Last, in the Second Report and Order we noted that Congress directed us to "design and test multiple alternative methodologies under appropriate circumstances."[19] Thus, where appropriate, we intend to choose bidding methods other than simultaneous multiple round auctions and periodically reevaluate the effectiveness of all methods utilized.

B. IVDS Competitive Bidding Design

11. We find that the generally preferred method of simultaneous multiple round auctions is not the most appropriate for IVDS, and that IVDS also presents a good opportunity to test less complex alternative procedures. As discussed below, of the auction methods described in the Second Report and Order, oral bidding (open outcry) and single round sealed bidding appear best suited to the IVDS. Both are relatively inexpensive for the Commission to administer, and the costs of participation by bidders are fairly low. Moreover, both have the advantage of being relatively simple for bidders to understand and also generally can be completed quickly. Thus, these methods are likely to promote the statutory goal of rapid implementation of service to the public.[20] We therefore adopt these two methods to auction IVDS licenses.[21]

12. The IVDS offers two 500 kilohertz channels (frequency segments A and B) in each of 734 service areas, and the aggregation of both channels in a market is not permitted. While there may be some degree of interdependency among the IVDS licenses for geographically contiguous areas,[22] we do not believe that it is great enough to justify the greater costs and administrative complexities associated with holding a simultaneous multiple round auction.[23] Last, with large numbers of IVDS licenses covering only rural areas,[24] we anticipate that the demand for, and value of, most markets will not be great enough to justify the use of more complex methods such as simultaneous multiple round auctions.[25]

13. For IVDS open outcry auctions, each service area (with two licenses each) will be auctioned individually, and the two highest bidders in each service area will be awarded a license. The highest bidder will get first choice of frequency segment A or segment B at the highest bid price. The second highest bidder will be awarded the remaining segment at the amount it bid.

14. With single round sealed bidding, we will auction the two frequency segments separately. Licenses for frequency segment will be auctioned first. As soon as practicable thereafter, we will announce the high bidders for licenses on frequency segment B and announce a deadline date for short-form applications for segment A licenses. In the event of a tie in single round sealed bidding, we will hold one additional round between the parties that tied.

15. Having both oral and sealed bidding methods available permits us the flexibility to fit the right auction method to the particular IVDS licenses being auctioned. Further, it is consistent with Congress' directive that we design and test multiple alternative methodologies under different circumstances. ICC comments that, of the two methods, sealed (or electronic) bidding is preferable to oral bidding because some potential bidders perhaps cannot afford to attend an auction in person.[26] As noted in the Second Report and Order, however, such sealed bidding generates no information about license values until after the auction closes, tending to decrease bid levels and reduce the efficiency of the license assignment.[27] We therefore believe that oral bidding should be used in the potentially higher valued markets, where having license value information during the auction is especially important, and that sealed bidding should be used for the remaining markets.[28]

16. We believe that, in general, the greater the population in the service area, the greater will be the perceived value of, and demand for, the license. The 734 service areas for the IVDS are identical to those of cellular radio service areas: 306 "Metropolitan Statistical Areas" (MSAs) and 428 "Rural Service Areas" (RSAs).[29] We have concluded that we should conduct oral auctions for the IVDS service areas corresponding to MSAs, and sealed bid auctions for the remaining service areas, or RSAs. We reserve the discretion to reconsider this bidding design if, in light of experience gained with auctions, a change appears warranted.[30]

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[19] *Id.* at ¶ 115, *quoting* 47 U.S.C. § 309(j)(3); *see also* ICC comment at 9 (supporting IVDS as a candidate for testing alternative methodologies).

[20] *See* 47 U.S.C. § 309(j)(3)(A).

[21] If, as we gain experience, we find that another auction design for the IVDS would better achieve the goals of the Budget Act, we may revisit this issue.

[22] Two commenters, EON and ICC, very briefly address the issue of potential interdependence among IVDS licenses. EON argues that the sequence of IVDS auctions should track "ADIs," a proposal we discuss and adopt *infra*. EON does not state, however, that bidders might perceive the aggregation of licenses to result in additional efficiencies of IVDS operation. EON *ex parte* filing of Jan.26, 1994, at 4. ICC states that auction procedures favoring license aggregation run counter to policies favoring licensee diversity. ICC Comment at 7.

[23] The interdependencies for IVDS are likely to be less than for services where "roaming" is important. *See generally* Second Report and Order at ¶ 91. The IVDS rules do not permit roaming across service areas.

[24] *See* note 5, *supra*.

[25] *See* Second Report and Order at ¶ ¶ 112-113.

[26] ICC comment at 6-7, reply comment at 7-8. Chase would prefer that we randomly alternate between oral and sealed methodologies. Chase comment at 1-2.

[27] Second Report and Order at ¶ 89 n.81.

[28] For example, when choosing between the two methods, we do not want to hold the more expensive oral bidding auction in instances where we believe that the operational costs of holding the auction might outweigh the benefits (efficient allocation and revenues generated).

[29] *See* note 5, *supra*.

[30] For instance, sealed bidding might be appropriate if we

C. Bidding Procedures

17. *Sequencing.* We must choose the sequence in which IVDS licenses will be auctioned. We believe that, in general, the higher valued IVDS licenses should be auctioned first: the cost to the public from delaying licensing increases with the value of the license, and, to the limited extent that aggregation of licenses is important, auctioning the higher valued licenses first facilitates it.[31] In determining the sequence for auctioning IVDS licenses we are persuaded by EON's argument that the IVDS is a television-driven service and that the licenses should therefore be auctioned in a manner consistent with the geographic areas defined by "Areas of Dominant Influence" (ADIs),[32] rather than by numerical order of service area. EON and ICC also commented generally that licenses for the more densely populated IVDS service areas should be auctioned prior to the other areas.[33] Therefore, we will auction licenses in ADI order, starting with the lowest numbered ADI (having the highest population) and proceeding in numerical order.[34] Prior to starting the auction process, we will issue a Public Notice listing the pertinent ADIs, and the order in which licenses for the corresponding service areas will be auctioned (by open outcry) in each ADI. We anticipate that we will hold sealed bid auctions for licenses in rural areas as soon as practicable after auctioning the more populated areas. For the rural areas, licenses on frequency segment B will be auctioned first, and then a separate sealed bid auction will be held for licenses on frequency segment A.

18. *Bid Increments.* In a multiple round auction, a bid increment is the amount or percentage by which a bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round of bidding. For IVDS auctions, the Commission, including the auctioneer, retains the discretion to impose bid increments before or during the auction.[35]

IV. PROCEDURAL, PAYMENT AND PENALTY ISSUES

A. Pre-Auction Application Procedures

19. The Second Report and Order established general rules and procedures for participating in auctions. Again, however, we noted that these might be modified on a service-specific basis. As described below, we have determined that we will follow the procedural, payment, and penalty rules established in the Second Report and Order, with certain minor modifications to fit the IVDS. Certain procedural details will be supplied later by Public Notice(s). Our objective has been to design rules and procedures that will reduce administrative burdens and costs on bidders and the Commission, ensure that bidders and licensees are qualified and able to construct their systems, and minimize the potential for delay of service to the public.

20. We will require applicants to follow the application filing and processing rules outlined in the Second Report and Order.[36] Before each scheduled IVDS auction the Commission, or, pursuant to delegated authority, the Private Radio Bureau, will release Public Notices concerning the auction. The Public Notices will specify the license(s) to be auctioned and the time, place, and method of competitive bidding to be used, as well as applicable bid submission and payment procedures. A Public Notice will also specify the filing deadline date for short-form applications.

21. Bidders will be required to submit short-form applications on FCC form 175 by the date specified in the Public Notice.[37] If the Commission receives only one application that is acceptable for filing for a particular frequency segment, and there is thus no mutual exclusivity,[38] the Commission will by Public Notice cancel the auction for this license and establish a date for the filing of a long-form application (FCC Form 574). In order to encourage maximum bidder participation, we will provide applicants whose short-form applications are substantially complete, but which contain minor errors or defects, with an opportunity to correct their applications prior to the auction. However, applicants will not be permitted to make any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia.[39] In addition, applications that are not signed or that fail to make the required certifications will be dismissed and may not be resubmitted.

22. The Commission will issue a subsequent Public Notice listing all applications containing minor defects, and applicants will be given an opportunity to cure and resubmit defective applications. After reviewing the corrected applications, the Commission will release another Public Notice announcing the names of all applicants whose applications have been accepted for filing.

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re-auction a small number of MSAs, or postpone initially the auctioning of MSAs located near international borders while agreements are negotiated.

[31] Second Report and Order at ¶ ¶ 117-120. We have noted, "Knowing who has won [the] large markets is likely to be more important for bidding decisions about small markets than the converse." *Id.* at ¶ 119.

[32] This standard market definition, developed by Arbitron Ratings Company, places each county in the continental U.S. within one of 210 ADIs.

[33] EON *ex parte* filing of Jan.26, 1994, at 2, 4; ICC comment at 7.

[34] The majority of ADIs comprise a number of MSAs. *See generally* note 5, *supra*. We will auction the lowest numbered service area in the ADI first, then go in numerical order until all MSAs in that ADI are auctioned. We will also auction the remaining service areas (MSAs) that make up the ADIs for the 9 markets that were lotteried. *See id.*

[35] *See generally id.* at ¶ 126.

[36] Second Report and Order at ¶ 160-188. In its comments, RTT sets forth a waiver request and asks that we rule on it in advance of the IVDS auctions. RTT comment at 1-5. Specifically, RTT requests that the Commission, by declaratory ruling, rule that any IVDS licensee using "T-NET" technology, with a power level greater than that permitted in our rules, will be granted a rule waiver to permit the power level. We will not make the requested ruling at this time. All requests for waiver must be evaluated in the context of a specific system design for avoidance of interference to television reception. This information can be provided when the applicant files a long-form application for license in a particular market. *See generally* Second Memorandum Opinion and Order in Gen. Docket No. 91-2, 8 FCC Rcd 2787, 2788 ¶ 8 (1993).

[37] Applicants should note whether they intend to bid for one or both frequency segments. Applicants need not submit microfiche originals or copies.

[38] As noted previously, absent mutually exclusive applications, the Commission is prohibited from auctioning the license. 47 U.S.C. § 309(j)(1).

[39] *See* Second Report and Order at ¶ 167.

B. Upfront Payment

23. In the Second Report and Order, we described three types of payments: upfront payments, down payments, and final payments. Chase favors upfront payments, while ICC believes that such a requirement would constitute a hardship on small entrepreneurs.[40] We believe an upfront payment is needed for oral outcry IVDS auctions. Requiring this payment provides some degree of assurance that only serious, qualified bidders will participate and serves as a deterrent to the filing of speculative applications which tend to slow down the provision of service to the public. It also provides the Commission with a source of funds to satisfy any penalties assessed. Therefore, we will require the upfront payment and retain the flexibility to determine the payment amount on an auction-by-auction basis. We will not, however, require an upfront payment for applicants in sealed bid IVDS auctions.

24. A bidder may file applications for every IVDS license being auctioned, but, for open outcry auctions, its upfront payment should reflect the maximum number of licenses it desires to win. Once a bidder is a "winning" bidder for the maximum number of licenses reflected by its upfront payment, it will be precluded from bidding further. We will use the following procedure for collecting this payment for oral bidding IVDS auctions. The applicant or its representative will be required to show the Commission, immediately prior to the auction, a cashier's check for at least $2,500[41] in order to get a bidding number and enter the designated area in the room where the bidding will take place. Bidders will be required to have $2,500 upfront money for every five licenses they win.[42] The $2,500 upfront payment will be collected immediately after the first license is won by an applicant.[43] The highest bidder will be asked to sign a bid confirmation form. The upfront money will later be counted toward the down payment. We believe these procedures will keep the auction process simple, keep costs down for small businesses who wish to bid on only a few licenses, and eliminate Commission expenses due to issuing refunds.

C. Payment for Licenses Awarded by Competitive Bidding

25. To provide further assurance that winning bidders will be able to pay the full amount of their bids, we decided generally in the Second Report and Order that each winning bidder must tender a down payment sufficient to bring the total deposit up to 20 percent of the winning bid. We believe a down payment is appropriate for IVDS. Therefore, winning bidders will be required to supplement their upfront payments to bring their total deposit with the Commission up to at least 20 percent,[44] of the final payment due for the license(s) won in that particular auction.[45] The down payment will be due within five business days after the close of bidding.[46] The down payment will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties. During the period that deposits are held pending ultimate award of the license, the interest that accrues, if any, will be retained by the Government.

26. Long-form applications (FCC Form 574) will be due from successful bidders within 10 business days after they have been notified of their winning bidder status.[47] Once we have reviewed the application and made a determination that the applicant is qualified, we will grant the license, conditioned on the timely payment of all monies due. In the Second Report and Order, we decided to require auction winners to make full payment of the balance of their winning bids within 5 business days of the grant of their license, except for small businesses using the preference of installment payments.[48] This time frame appears to be appropriate for IVDS, and we will therefore use it.

D. Default and Disqualification

27. In the Second Report and Order, we concluded that strong incentives are needed to ensure that potential bidders are financially and otherwise qualified to participate in

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[40] Chase comment at 2; ICC comment at 8, reply comment at 7.

[41] In establishing procedures for auctioning IVDS licenses, we have tried to reduce the complexities of the auction process for both the Commission and potential applicants. To this end, we have established a standard, reasonable upfront payment amount in lieu of an amount based on a formula (*e.g.*, $0.02/pop/MHz). Such a formula, when used in the context of more populated areas, can result in a very substantial upfront payment. In the context of IVDS, we believe $2,500 strikes a good balance between ensuring that only serious, qualified bidders participate and not placing an unreasonable financial burden on small businesses. This amount was established in the Second Report and Order, *see id.* at ¶ 180, as the general minimum upfront payment, consistent with comments submitted.

[42] For example, if a bidder brings only one check for $2,500 and wins five licenses, he or she will not be allowed to bid on another license. If a bidder brings two $2,500 checks, he or she may bid until 10 licenses are won. Therefore, if a bidder anticipates winning 16 licenses, he or she must bring four $2,500 cashier's checks.

[43] The upfront money will be collected immediately after the first license is won in each group of five licenses (1, 6, 11, etc.). Bidders should bring a $2,500 cashier's check for each five licenses they desire to purchase. The Commission will not refund money to those bringing a single check to cover the total upfront payment required, rather than multiple $2,500 checks, if the single check is for an amount ultimately greater than the upfront payment required. On request we will, however, apply such balance to any further monies owed in the context of IVDS auctions.

[44] Small businesses using the preference of installment payments, *see* Section VI below, need only bring their deposits up to 10 percent within 5 business days, with the remaining 10 percent due within five days of the license grant. *See* Second Report and Order at ¶ ¶ 192 n.145, 238.

[45] If the upfront payment already tendered amounts to 20 percent or more of the winning bid, no additional deposit will be required.

[46] Second Report and Order at ¶ 192. For single round sealed bidding, we will notify the high bidders soon after the auction. The down payment will then be due within five business days.

[47] If a filing fee is required, the general rules governing the submission of fees will apply. *See* 47 C.F.R. § 1.1101 *et seq.* These rules provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds, or is otherwise not in compliance with our fee rules. *See also* Second Report and Order at ¶ 167 n.127.

[48] *Id.* at ¶ 194.

auction proceedings, so as to avoid delays in the deployment of new services to the public.[49] We stated that, for open outcry auctions, we will assess a default penalty if a bidder fails to make the down payment on a license, fails to pay for a license, or is disqualified after the close of an auction. In the case of single round bidding, we stated that we will impose a penalty in instances where the default occurs after the high bidder has been notified by the Commission that it has submitted the high bid.[50]

28. In an oral auction, a winning bidder that withdraws its bid after signing a bid confirmation form or fails to remit the required down payment or balance of its winning bid in the time frame specified, will be deemed to have defaulted. In a sealed bid auction, a winning bidder is deemed to have defaulted if it withdraws its bid after publication of the initial public notice notifying auction winners or fails to remit the required down payment or balance of its winning bid in the time frame specified. In such instances, we may re-auction the license or offer it to the next highest bidder(s). In cases where disqualification or default occurs after the full down payment has been made, we will hold a new auction for the license. Further, "if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission also may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant."[51] Entities who obtain their licenses through the auction process are put on notice that if their licenses are revoked or canceled they will forfeit all monies paid to the Commission regarding those licenses.[52]

29. We believe it is important to adopt default penalties for IVDS auctions. If a bidder in an oral auction defaults or is disqualified, a default penalty will be imposed equal to the difference between the bidder's high "winning" bid and the amount of the winning bid the next time the license is offered by the Commission, if this latter amount is lower. In addition, with open outcry auctions, the defaulting auction winner will be assessed a penalty of three (3) percent of the subsequent winning bid or three percent of its own (the defaulting bidder's) bid, whichever is less.[53] The additional three percent penalty is designed to discourage insincere bidding and to compensate the government for the cost of reauctioning a license. In single round sealed bid auctions, if a high bidder defaults prior to making the required down payment, we will impose a default penalty equal to the difference between the high bid and the next highest bid. If a high bidder defaults after having made the down payment, the additional three percent penalty will be applied.[54]

V. REGULATORY SAFEGUARDS

A. Unjust Enrichment Provisions

30. Congress directed that we take steps to prevent unjust enrichment due to trafficking in licenses that were obtained through competitive bidding. 47 U.S.C. § 309(j)(4)(E). In Section VI, below, we adopt specific rules governing unjust enrichment by designated entities.[55] The IVDS rules already contain provisions to reduce trafficking,[56] and ICC argues that these rules are sufficient.[57] Consistent with the Second Report and Order, however, the IVDS-specific anti-trafficking provisions will not apply to licenses obtained through competitive bidding, although we will enforce the new transfer disclosure requirements contained in Section 1.2111 of our rules.[58] Generally, applicants seeking to transfer their licenses within five years of the initial license grant will be required to file, together with their transfer application, the associated contracts for sale, option agreements, management agreements, and all other documents disclosing the total consideration received in return for the transfer of the license. We will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for an assignment or transfer of control of their licenses, in order to determine whether any unforeseen problems relating to unjust enrichment have arisen outside of the designated entity context.

B. Performance Requirements

31. Congress has directed that the Commission, in implementing auction procedures, "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of: new technologies and services."[59] In the Second Report and Order, we decided that it was unnecessary and undesirable to impose additional performance requirements for auctionable services beyond those already provided in service rules.[60] The IVDS rules already contain specific performance requirements, such as the requirement to build-out the system within a specified period of time. *See, e.g.*, 47 C.F.R. § 95.833. Entities that obtain, by transfer or assignment, an IVDS license that was awarded by competitive bidding, take such license subject to the existing performance requirements.

C. Rules Prohibiting Collusion

32. In the Second Report and Order we adopted special rules prohibiting collusive conduct in the context of competitive bidding. *See* 47 C.F.R. § 1.2105(c). We indicated that such rules would serve the objectives of the Budget

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[49] *Id.* at ¶ ¶ 195-197.
[50] *Id.* at ¶ ¶ 156-157.
[51] *Id.* at ¶ 198.
[52] This includes licensees who fail to meet the construction benchmarks contained in 47 C.F.R. § 95.833.
[53] Second Report and Order at ¶ ¶ 154-157.
[54] *See id.* at ¶ 157.
[55] *See* ¶ ¶ 47, 52, 54 & n.90, *infra*. We have amended 47 C.F.R. § 95.819 to clarify the procedures for the transfer or assignment of IVDS licenses.
[56] For example, current IVDS licenses must meet the five-year construction benchmark before they may transfer, sell, assign, or give an IVDS license to another entity. *See* 47 C.F.R. § 95.819.
[57] ICC comment at 7.
[58] *See* 47 C.F.R. § 1.2111; Second Report and Order at ¶ ¶ 263-265.
[59] 47 U.S.C. § 309(j)(4)(B).
[60] Second Report and Order at ¶ 219.

Act by preventing parties, especially larger firms, from agreeing in advance to bidding strategies that might divide the market according to their strategic interests and to the disadvantage of other bidders. These rules apply to all auctionable services, including the IVDS. Bidders are required to identify on their FCC Form 175 applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate to the competitive bidding process. Bidders are also required to certify that they have not entered into any explicit or implicit agreements, arrangements or understandings with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. After the short-form applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.

33. Concerning bidding consortia, joint venture, partnership or other such agreements or arrangements, all such arrangements must have been entered into prior to the filing of short-form applications. Where specific instances of collusion in the competitive bidding process are alleged, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions.

VI. TREATMENT OF DESIGNATED ENTITIES

A. Introduction

34. As discussed in the Second Report and Order, Congress mandated that the Commission "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services." 47 U.S.C. § 309(j)(4)(D). The statute requires the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" in order to achieve this congressional goal. In addition, Section 309(j)(3)(B) provides that in establishing eligibility criteria and bidding methodologies the Commission shall promote "economic opportunity and competition ... by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B). Finally, Section 309(j)(4)(A) provides that to promote these objectives, the Commission shall consider alternative payment schedules, including lump sums or guaranteed installment payments.

35. In the Second Report and Order we established the eligibility criteria and general rules that would govern the award of preferences for designated entities. We also established a menu of preferences, including installment payments and bidding preferences, that we could choose from in selecting the preferences that will be applicable to a particular service, and specified the circumstances under which a tax certificate program would be established. In addition, we set forth rules to prevent unjust enrichment by designated entities seeking to transfer licenses obtained through use of one of the preferences.

36. In this Fourth Report and Order we adopt specific preferences for the IVDS designed to ensure that designated entities are given the opportunity to participate both in the competitive bidding process and in the provision of the service. In particular, we adopt the following preferences:

> (1) A 25 percent bidding credit will be available for one license in each service area (for either frequency segment A or B), for businesses owned by minorities and/or women;
>
> (2) Tax certificates will be available to initial investors in minority and women-owned enterprises upon divestiture of their non-controlling interests, and to licensees who transfer their authorizations to minority or women-owned businesses; and
>
> (3) Installment payments will be made available to small businesses.

We also incorporate and adopt the unjust enrichment provisions adopted in the Second Report and Order applicable to each of the preferences we adopt here, and adopt the designated entities eligibility requirements of the Second Report and Order.[61]

37. We received IVDS-specific comments favoring the preferences of spectrum set-asides[62] and royalty payments.[63] As we noted in the Second Report and Order, however, the appropriateness of preferences is best determined in light of the characteristics of the particular service and the nature of its expected pool of bidders, and we find that these preferences are not appropriate for the IVDS. Concerning set-asides, we note that the total spectrum available in the service is small: two 500 kilohertz channels available in each service area. Thus for the IVDS, with its licensing scheme of two licenses per market, the use of set-asides would result in one of every two licenses being reserved for designated entities. We decline to reserve so great a proportion of the service's spectrum. Furthermore, in the Second Report and Order we decided, for all services, not to use the preference of royalty payments.[64] While we will continue to assess the feasibility of these preferences as we gain experience with auctions in the context of this and other services, we are not persuaded to change our decision for the IVDS.

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[61] *See* 47 C.F.R. § 1.2111; Second Report and Order at ¶ ¶ 267-278.

[62] Breen and ICC favor set-asides as a means to encourage applications from small businesses. Comments of Breen 9; ICC at 4-6. ICC also argues that, without set-asides, large telecommunications providers might attempt to stifle IVDS technology or permit it only as an adjunct to existing offerings. ICC comments at 5-6.

[63] Breen and ICC state that this option will encourage participation by designated entities. Breen at 7; ICC comment at 7, reply comment at 8.

[64] *Id.* at ¶ ¶ 252-253.

38. We note that the IVDS, with its expected relatively low capital entry requirements, is well suited for ownership by designated entities and other potential bidders that might otherwise lack the financial resources to compete by auction for a license. This, combined with the variety of uses possible with the service, makes it likely that the IVDS will promote economic growth and enhance the access of consumers to new and innovative service offerings. As we gain experience with IVDS auctions, we intend continually to assess the effectiveness of our measures, and will apply the knowledge gained to subsequent auctions for other services.

B. Bidding Credits

39. In the Second Report and Order we stated that we would consider using bidding credits to encourage participation by designated entities in auctions. Upon consideration and review of the record on this subject, we believe that affording businesses owned by minorities and women a substantial bidding credit for certain specified IVDS licenses is the most cost-effective and efficient means of achieving Congress' objective of "ensuring" the opportunity of these designated entities to participate in the provision of IVDS offerings. Bidding credits will provide minority and women-owned firms with a significant advantage, which we believe is necessary to achieve this congressional goal, while preserving the advantages of open bidding competition. In effect, the bidding credit will function as a discount on the bid price a minority or women-owned firm will actually have to pay to obtain a license and, thus, will address directly the financing obstacles encountered by these entities. We believe that a bidding credit in the amount of twenty-five (25) percent is necessary to provide these designated entities with a significant enough advantage to ensure their ability to compete successfully for some IVDS licenses. Thus, in each market, a single 25 percent bidding credit will be awarded to a business owned by minorities and/or women if it is a winning bidder.[65]

40. As discussed in the Second Report and Order, Congress mandated that the Commission "ensure" the opportunity for participation in spectrum-based services by each category of designated entity, including businesses owned by minorities and women. This plain language leads us to conclude that adequate measures must be taken to assure that minority and women-owned businesses have the ability to participate in the provision of services subject to competitive bidding. Moreover, in enacting this legislation, it is clear that Congress was concerned about disseminating licenses to a wide variety of applicants and wanted the Commission to take meaningful steps to accomplish this goal.[66] Indeed, Congress included a requirement in the statute that the Commission report to it in 1997 about, among other things, whether competitive bidding facilitated the introduction of new companies into the telecommunications market and whether designated entities "were able to participate successfully in the competitive bidding process." 47 U.S.C. § 309(j)(12)(iv).

41. Apart from Congress' directive, we think that ensuring opportunities for women and minorities to participate in the IVDS is important for the telecommunications industry. These companies can play a vital role in serving inner city areas and other niche markets that may be overlooked by other companies, thus promoting our goal of universal access to telecommunications services. Not only will the industry become more diverse through the adoption of meaningful preferences, but we believe that a much wider customer base will obtain access to innovative technologies. Moreover, studies show that even when minority-owned firms do not locate within urban minority communities, they employ more minorities relative to other companies, thereby promoting our goals of equal employment opportunity and economic growth.[67]

42. The general record in this proceeding[68] reflects a severe underrepresentation of minorities and women in telecommunications. Indeed, the Commission's Small Business Advisory Committee (SBAC) found only 11 minority firms engaged in the delivery of cellular, specialized mobile radio, radio paging, or messaging services.[69] Likewise, American Women in Radio and Television (AWRT) found that only 24 percent of small communications businesses are owned by women (when companies without paid employees are excluded, women own less than 15 percent of small communications firms).[70] Many commenters observe that the factors that preclude minorities and women from effective participation concern access to financing. With regard to women, they note that no existing FCC policy provides an incentive for women to enter the communications business, and that access to capital remains the biggest obstacle women business owners must face. Similarly, the SBAC states that minorities frequently do not or cannot use traditional sources of financing. Citing the U.S. Senate amicus brief in *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990), the SBAC asserts that "spectrum for radio facilities was first allocated at a time when undisguised

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[65] Only one bidding credit is available in each market. If it happens that the two highest bidders are both designated entities eligible for a bidding credit, the second highest bidder will be given the option of accepting the remaining license without the credit, or declining the remaining license.

[66] We have decided not to provide bidding credits (or other separate preferences) to rural telephone companies bidding on IVDS spectrum because we conclude that, given the relatively modest build-out costs for systems in this service, such preferences are unnecessary to ensure the participation of rural telephone companies in the provision of IVDS offerings to rural areas. The preferences are also, therefore, unnecessary in this context to meet Congress' intent to ensure that rural consumers receive the benefit of new technologies such as IVDS. Rural telephone companies will, however, be eligible for bidding credits if they are owned by minorities or women. They may also qualify for installment payments if they satisfy the eligibility criteria for small businesses.

[67] *See, e.g.*, 47 C.F.R. § 21.307, 22.307 (equal employment opportunity rules for common carriers); Implementation of the Commission's Equal Employment Opportunity Rules (Notice of Inquiry), FCC 94-103 (released April 21, 1994) ("|O|ur EEO rules enhance access by minorities and women to increased employment opportunities which are the foundation for increasing opportunities for minorities and women in all facets of the communications industry, including participation in ownership. Thus the rules ... promote the further development of the broader communications infrastructure.") *See also* Banking on Black Enterprise at 3.

[68] For a list of all commenters in this proceeding, see Appendix A, Second Report and Order. Footnote 14, *supra*, lists those commenters that made IVDS-specific comments.

[69] Report of the FCC Small Business Advisory Committee to the FCC Regarding Gen. Docket No. 90-314 (Sept. 15, 1993), *reprinted at* 8 FCC Rcd 7820, 7827 (1993).

[70] *See* Comments of AWRT at 5.

discrimination in education, employment opportunities, and access to capital excluded minorities from all but token participation." The SBAC concludes that minorities were impeded from successfully competing for licenses when they were first awarded and, due to systematic barriers to technical training and employment opportunities, this situation has continued over time.

43. Given this history of underrepresentation of minorities and women in telecommunications and the inability of these groups to access financing, we find that the best way we can accomplish these statutory mandates is to provide bidding credits exclusively to minority and women-owned businesses. The record demonstrates that women and minorities face barriers to entry not encountered by other firms, including other designated entities, and it is, therefore, appropriate and necessary that we provide them with a substantial bidding advantage.[71] In other contexts, Congress has recognized that the use of preferences in the licensing process can be necessary to remedy underrepresentation by minorities. For example, in 1982, Congress mandated the grant of a "significant preference" to minority applicants participating in lotteries for spectrum-based services. 47 U.S.C. § 309(i)(3)(A). And, in 1988, Congress attached a provision to the FCC appropriations legislation that precluded the Commission from spending any appropriated funds to examine or change its minority broadcast preference policies.[72] Absent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of the services in question.[73]

44. We also agree with Call-Her that even comparatively large businesses owned by women and minorities face discriminatory lending practices and other discriminatory barriers to entry and, therefore, eligibility for bidding credits should not be limited to small firms. The IVDS auctions present a unique licensing opportunity for these historically disadvantaged groups to gain a foot-hold in the communications industry.[74] Our goal is to encourage businesses owned by minorities and women to provide viable, sustained competition to larger businesses. Therefore, we have accorded preferences to minority and women-owned firms regardless of their size. This approach is consistent with our auction rules and will further the statutory mandate to ensure participation by designated entities.[75]

45. Further, Congress clearly intended that businesses owned by minorities and women must be given the opportunity to participate in the provision of spectrum-based services independent of their status as small businesses. The plain language of Section 309(j)(4)(D) states that the Commission "shall ... ensure" the opportunity for participation by "small businesses ... *and* businesses owned by members of minority groups and women ...." (emphasis added). If Congress had intended to limit the directive of Section 309(j)(4)(D) only to small businesses, no need would have existed to mention separately minorities and women. Moreover, Section 309(j)(4)(D) was added at Conference, and the Conference Report does not offer any suggestion that, to come within the section's purview, businesses owned by minorities or women must be small businesses. In contrast, and as we discussed more fully in the Second Report and Order, the legislative history of Section 309(j)(4)(A), relating to installment payments, expressly indicates that the provision was intended only to promote financial assistance for small businesses.[76] Accordingly, we shall interpret Section 309(j)(4)(D) in accordance with its plain language and will not limit its application to small businesses.[77]

46. In determining the appropriate amount of the bidding credit we considered several factors. First, we agree with those commenters that support a bidding credit of 25 percent or more[78] because we think that a substantial credit is necessary to ensure meaningful participation by minority and women-owned businesses. In the broadcast context, we have noted that licensees can transfer their stations to minorities in distress sales provided that the price is no more than 75 percent of market value.[79] This policy is

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[71] *See, e.g.*, Comments of AWRT at 4-7; Call-Her at 5; Cook Inlet at 38-39.

[72] Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-102, 101 Stat. 1329-31.

[73] In the Second Report and Order, we addressed the constitutionality of race and gender-based preferences and concluded that the proper standard of scrutiny to be employed in this context is the "intermediate scrutiny" standard used in the *Metro* case. Second Report and Order at ¶ ¶ 289-297; *see* 110 S. Ct at 2997. We further concluded that under such a standard, preferences for minority and women-owned businesses are constitutionally permissible. We recognize that *Metro* 's standard of review applies to measures approved by Congress. 110 S. Ct. at 3008-09. As noted above, the bidding credits in question here were expressly approved and, indeed, are required to achieve the statutory goals. *See* 47 U.S.C. § 309(j)(4)(D) (The Commission must "consider the use of tax certificates, bidding preferences, and other procedures" to ensure the participation of "small businesses, rural telephone companies, and businesses owned by members of minority groups and women."). Moreover, an argument might be made that IVDS licensees will be able to control the content of the transmissions carried on their facilities and that the service can therefore be analogized (at least) to mass communications media. *See, e.g.*, Johnson comment at 1-4, 8 (like other emerging subscription-based services, IVDS will, in practice, increasingly converge with broadcast and cable services). To the extent that this control exists or is later developed with regard to the IVDS, the preferences we adopt for minorities and women would be consistent with the important governmental interest identified in *Metro:* increasing minority ownership to encourage diversity in the provision of content.

[74] Because of the discrimination suffered by minorities and women as contractors and subcontractors in the telecommunications industry, *see* MBELDEF Study, this unique chance to enter the field as primary telecommunications providers, competing with, rather than dependent upon, other providers, is especially important.

[75] *See* Banking on Black Enterprise at 13 (government assistance should accrue to more capable black entrepreneurs, who are most likely to contribute to the goal of economic development).

[76] *See* Second Report and Order at ¶ ¶ 234-236.

[77] Even though small businesses are also mentioned in Section 309(j)(4)(D), we do not believe bidding preferences for small businesses are appropriate for IVDS auctions. We believe the installment payments preference, as outlined below, will be sufficient to ensure their participation.

[78] See comments of AIDE at 7, Devsha at 5, NABOB at 10-11, and *ex parte* filing of Personal Communications Network Services of New York at 2-3, each suggesting a bidding credit of 25 percent. Rocky Mountain Telephone proposes a 50 percent bidding credit. Comments of Rocky Mountain Telephone at 16. And Richard Vega proposes a 100 percent bidding credit for certain designated entities. Comments of Richard Vega at 7.

[79] *See Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980).

based upon our finding that 25 percent is an appropriate discount to eliminate financial entry barriers for minority-owned companies seeking to become broadcast licensees. Likewise, we believe that a bidding credit of 25 percent will adequately ensure participation by a wide variety of minority and women-owned firms in IVDS auctions and service provision. The amount is not so substantial, however, as to foster participation by firms that are not otherwise financially capable of building-out an IVDS system. We will monitor carefully the effectiveness of the 25 percent bidding credit in the IVDS context and continually assess whether it is achieving the goal of ensuring that minority and women-owned firms participate successfully in auctions for this service.

47. To prevent any unjust enrichment by minorities or women trafficking in licenses acquired through the use of bidding credits, we will impose a forfeiture requirement on transfers or assignments of such licenses to entities that are not owned by minorities or women.[80] Minority and women-owned businesses seeking to transfer or assign a license to an entity that is not owned by minorities or women will be required to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer or assignment will be permitted. The amount of the penalty will be reduced over time: a transfer or assignment in the first two years of the license term will result in a forfeiture of 100 percent of the value of the bidding credit; during year three, of 75 percent of the bidding credit; in year four, of 50 percent; in year five, of 25 percent; and thereafter, no penalty.[81] Furthermore, as noted earlier, we will use the eligibility criteria from the Second Report and Order to ensure that only legitimate minority and women-owned firms are able to take advantage of bidding credits. In addition, to further ensure that our rules are as narrowly tailored as possible, while still fulfilling the statutory goal, we are prohibiting publicly-traded companies from taking advantage of the bidding credits and we are providing bidding credits for only one license in each market for businesses owned by minorities or women.

C. Tax Certificates

48. Congress instructed the Commission to consider the use of tax certificates to ensure designated entity participation in spectrum-based services. *See* 47 U.S.C. § 309(j)(4)(D). In the Second Report and Order we observed that tax certificates could be useful as a means of attracting investors to designated entity enterprises and to encourage licensees to assign or transfer control of licenses to designated entities in post-auction transactions. We stated further that we would examine the feasibility of using this measure in subsequent service-specific auction rules.[82] After further consideration of this matter, we believe that tax certificates would be an appropriate tool to assist minority and women-owned businesses to attract start-up capital from non-controlling investors. In addition, we believe that tax certificates will give licensees the incentive to assign or transfer their authorizations to such entities in post-auction sales, thereby providing added assurance that minority and women-owned entities will have the opportunity to participate in the provision of IVDS offerings. Accordingly, we will issue tax certificates to initial investors in minority and women-owned IVDS applicants upon the sale of their non-controlling interests. We will also issue tax certificates to IVDS licensees who assign or transfer control of their licenses to minority and/or women owned entities.

49. As stated previously, the record reveals that women and minorities face barriers to entry not encountered by other designated entities.[83] In particular, they have an especially difficult time accessing capital and, as a result, are severely under-represented in the telecommunications industry. Together with the other preferences we adopt today, tax certificates should help to ensure the participation of minority and women-owned businesses in this service. This measure will make it easier for these designated entities to attract start-up capital because investors will know that they can defer taxes on any gains made when their interests are sold. In addition, tax certificates will provide incentives to licensees to seek out minority and female buyers in after-market sales because the licensees will be able to defer taxes on profits made in the sale.

50. We have used tax certificates over the years to encourage broadcast licensees and cable television operators to transfer their stations and systems to minority buyers.[84] We also have granted tax certificates to shareholders in minority-controlled broadcast or cable entities who sell their shares, when such interests were acquired to assist in the financing of the acquisition of the facility.[85] These broadcast and cable tax certificates are issued pursuant to the Internal Revenue Code, 26 U.S.C. § 1071. While Congress' goal in authorizing tax certificates under Section 309(j)(4)(D) of the Act is somewhat different, and focuses on ensuring the opportunity for designated entities to participate in auctions and spectrum-based services, we think that it will be an equally valuable program. Issuance of tax certificates to investors and licensees that sell to minorities and women will augment the bidding credits preference, and together the measures should increase the ability of these entities to access financing, thus ensuring their opportunity to participate in IVDS auctions and services.

51. In implementing this program, we will borrow from our existing tax certificate program and grant tax certificates, upon request, that will enable the licensees and investors meeting the criteria outlined here to defer the gain realized upon a sale either by: (1) treating it as an involuntary conversion under 26 U.S.C. § 1033, with the recognition of gain avoided by the acquisition of qualified replacement property; or (2) electing to reduce the basis of certain depreciable property; or both. Tax certificates will be available to initial investors in minority and women-owned businesses who provide "start-up" financing, which allows these businesses to acquire licenses at auction or in the aftermarket, and those investors who purchase interests within the first year after license issuance, which allows for the stabilization of the designated entities' capital base. Also, in accordance with our existing policy, to be eligible for a tax certificate, such investor transactions must not

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[80] *See* Second Report and Order at ¶ 264.

[81] Interest will also be charged according to the total number of years the license was held.

[82] Second Report and Order at ¶ 251.

[83] *See* ¶ ¶ 42-44, *supra*.

[84] *See Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849 (1982) ("*1982 Policy Statement*"); *see also Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979 (1978)..

[85] *1982 Policy Statement*, 92 FCC 2d at 855-58.

reduce minority or female ownership or control in the entity below 50.1 percent. The definition of a minority or female-owned entity is set forth in the Second Report and Order and, with regard to our investor tax certificate policy, the entity in which the investment is made must satisfy that definition at the time of the original investment as well as after the investor's shares are sold. For after-market sales, tax certificates will only be issued to licensees who sell to entities that meet that definition. Tax certificates will be granted only upon completion of the sale, although parties can request a declaratory ruling from the Commission regarding the tax consequences of prospective transactions.

52. As with our other tax certificate policies, we wish to deter "sham" arrangements to obtain tax certificates and, pursuant to Section 309(j)(4)(E), therefore adopt measures to prevent unjust enrichment. First, we intend to enforce strictly the definitions adopted in the Second Report and Order and will carefully review investment and purchase arrangements to ensure that 50.1 percent control and equity by minorities and women was, and will be, maintained. Second, like our existing tax certificate program,[86] we will impose a one-year holding requirement on the transfer or assignment of IVDS licenses obtained through the benefit of tax certificates. We believe that the rapid resale of such licenses to non-minorities or women at a profit would subvert our goal of ensuring the opportunity to participate by minority and women-owned businesses. The well-established one-year holding period would prevent this type of unjust enrichment. While this restriction will not be applied to assignments or transfers to qualified minority and female-owned businesses, assignees and transferees obtaining licenses pursuant to this exception will be subject to the one-year holding requirement.

D. Installment Payments

53. In this Fourth Report and Order, we adopt the preference of installment payments and limit its use to small businesses. Permitting a winning bidder to pay by installment payments is the equivalent of having the government extend credit to the bidder. Using this option, a prospective licensee may not need to rely as heavily on private financing either before or after an auction. As a result, this method is an effective way to promote the participation of designated entities in the provision of spectrum-based services, and is an effective means to distribute licenses and services among geographic areas.[87] In the Second Report and Order, we decided that the option of installment payments should be extended only to small businesses (including those held by minorities and women), and then only in instances where smaller spectrum blocks are being auctioned and the use of the blocks is very likely to match the business objectives of *bona fide* small businesses.[88] With the IVDS, the spectrum blocks are relatively small and the potential difficulties associated with permitting this option in the context of larger spectrum blocks (*e.g.*, undercapitalization) are not present. We also find that, because of the expected relatively low capital entry requirements for the IVDS and the potential variety of offerings[89] that might result from the service, the IVDS will offer a *bona fide* business opportunity to small businesses.

54. Therefore, we will permit the use of installment plans for all IVDS auctions, and follow the general procedures given in the Second Report and Order for the use of this preference.[90] The installment payment option will enable all small businesses to pay the full amount of their winning bid in installments (less the upfront payment, which must be paid in full, and the down payment, half of which is due five days after the auction closes and the other half five days after the application is granted). Timely payments of all installments will be a condition of the license grant, and failure to make such timely payments on or before the date due may be grounds for revocation.[91]

VII. CONCLUSION

55. In summary, the rules and procedures we adopt in this Fourth Report and Order for auctioning licenses in the IVDS are designed to minimize the regulatory burdens on both applicants and the Commission, reduce the potential for delay of service to the public, and maintain safeguards to preserve the integrity of the bidding process. The rules also seek to meet Congressional objectives and serve two basic goals: promoting economic growth, and enhancing access to telecommunications service offerings for consumers, producers, and new entrants. We also take account of Congress' desire that designated entities previously underrepresented in the provision of telecommunications services be afforded preferences to encourage their participation. We expect that these procedures will lead to the development and rapid deployment of IVDS offerings across the country.

VIII. FINAL REGULATORY FLEXIBILITY ANALYSIS

56. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 604, the Commission's final analysis is as follows:

A. Need for, and purpose of, this action

As a result of the Budget Act referenced above, the Commission may utilize competitive bidding mechanisms in the granting of certain initial licenses. The Commission published an Initial Regulatory Flexibility Analysis, *see generally* 5 U.S.C. § 603, within the Notice of Proposed Rule Making in this proceeding, and published a Final Regulatory Flexibility Analysis within the Second Report

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[86] *See Amendment of Section 73.3597 of the Commission's Rules, Memorandum Opinion and Order*, 99 FCC 2d 971, 974 (1985).

[87] Second Report and Order at ¶ ¶ 231-233.

[88] *Id.* at ¶ ¶ 234-237. We noted that the legislative history of the Budget Act indicates that large entities with established revenue streams are not intended beneficiaries of the installment payments preference. *Id.* at ¶ 236.

[89] *See* note 3, *supra*.

[90] Under these general procedures, for example, only interest payments will be due for the first two years, with principal and interest both being amortized over the remaining years of the license. Also, interest charges will be fixed at the time of licensing at a rate equal to that of five-year U.S. Treasury notes, to track the IVDS license term of five years. *See* Second Report and Order at ¶ 239. If a small business making installment payments seeks to transfer a license to a non-small business entity during the term of the license, we will require payment of the remaining principal balance as a condition of the license transfer. *Id.* at ¶ 263.

[91] Limited grace periods for defaulting licensees may be considered on a case-by-case basis. *Id.* at ¶ 240.

and Order (at ¶ ¶ 299-302). As noted in that previous final analysis, this proceeding will establish a system of competitive bidding for choosing among certain applications for initial licenses, and will carry out Congressional mandates that certain designated entities be afforded an opportunity to participate in the competitive bidding process and the provision of spectrum-based services.

B. Summary of the issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis

In regard to the specific IVDS issues addressed by this Fourth Report and Order, no comments were submitted in response to our Initial Regulatory Flexibility Analysis.

C. Significant alternatives considered

Although, as described in (B) above, no comments were received pertaining to IVDS, the Second Report and Order addressed at length the general policy considerations raised as a result of the new legislation.

IX. ORDERING CLAUSES

57. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), this Fourth Report and Order is adopted, and Parts 0, 1, and 95 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix.

58. IT IS FURTHER ORDERED that the rule amendments set forth in the Appendix WILL BECOME EFFECTIVE 30 days after their publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Final Rules

Parts 0, 1, and 95 of Chapter 1 of Title 47 of the Code of Federal Regulations are amended as follows:

Part 0 - Commission Organization

1. The authority citation for Part 0 continues to read as follows:

Authority: Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155.

2. Section 0.131 is amended by adding new paragraph (k) to read as follows:

§ 0.131 Functions of the Bureau

* * * * *

(k) Develops, in coordination with the Office of Plans and Policy, policies for selection of licensees from mutually exclusive applicants in the Private Radio Services subject to competitive bidding; issues Public Notices announcing auctions of Private Radio Services licenses; specifies the licenses to be auctioned, the time, place and method of competitive bidding, including applicable bid submission procedures, bid withdrawal procedures, stopping rules and activity rules; specifies the filing windows for short-form applications, bidder certifications, and the deadlines for submitting filing fees, upfront payments and down payments.

Part 1 - Practice and Procedure

3. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 C.F.R. 154, 303: Implement, 5 U.S.C. 552 and 21 U.S.C. 853a, unless otherwise noted.

4. Section 1.912 is amended by redesignating paragraph (e) as paragraph (f) and adding new paragraph (e) to read as follows:

§ 1.912 Where applications are to be filed.

* * * * *

(e) Applicants submitting long-form applications pursuant to competitive bidding procedures (see §1.2107(c)) must mail or otherwise deliver their application to: Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, Attention: Auction Application Processing Section.

* * * * *

5. Section 1.922 is amended by adding two entries at the beginning of the table to read as follows:

§ 1.922 Forms to be used.

FCC Form	Title
175	
175-S	Application to Participate in an FCC Auction Supplemental Application to Participate in an FCC Auction.

* * * * *

6. In Section 1.972, paragraph (a)(1) is amended by removing the words "Part 95-Subpart F-Personal Radio Services" and paragraph (c) is amended by removing the words "or part 95-subpart F" and adding the word "or" after "part 90" in the first sentence.

Part 95 - Personal Radio Services

7. The authority citation for Part 95 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

8. New Section 95.816 is added to read as follows:

§ 95.816 Competitive bidding proceedings.

(a) Mutually exclusive IVDS initial applications are subject to competitive bidding.

(b) The General Procedures set forth in 47 C.F.R. Part 1, Subpart Q are applicable to competitive bidding proceedings used to select among mutually exclusive applicants for initial IVDS licenses.

(c) The specific procedures applicable to auctioning particular IVDS licenses will be set forth by Public Notice. Generally, the following competitive bidding procedures will be used to auction mutually exclusive IVDS licenses. The Commission, however, may design and test alternative procedures.

(1) Competitive bidding design. Sequential oral (open outcry) auctions will be used to assign licenses in and around large urban areas and single-round sealed bidding will be used for rural areas unless otherwise specified by the Commission. See 47 C.F.R. §§ 1.2103 and 1.2104.

(2) Forms.

(i) Applicants must submit short-form applications (FCC Form 175) as specified in Commission Public Notices. Minor deficiencies may be corrected prior to the auction. Major modifications such as changes in ownership, failure to sign an application or failure to submit required certifications will result in the dismissal of the application. See 47 C.F.R. § 1.2105(a) and (b).

(ii) Applicants must submit a long-form application (FCC Form 574) within ten (10) business days after being notified that it is the winning bidder for a license. See 47 C.F.R. § 1.2107(c) and (d).

(3) Upfront payments. For open outcry bidding, applicants will be required to show the Commission or its representative, immediately prior to the auction, a cashiers check for at least $2500 in order to get a bidding number and secure a place in the room where the bidding will take place. Bidders will be required to have $2500 upfront money for every five licenses they win. No upfront payment will be required from applicants in single round sealed bid auctions. See 47 C.F.R. § 1.2106.

(4) Down payments. Within five (5) business days after an open outcry auction is over, or within five (5) business days after being notified that it is the high bidder in a single round sealed bid auction, a high bidder on a particular license(s) must submit to the Commission's lockbox bank such additional funds as are necessary to bring total deposits (upfront payment plus down payment) up to twenty (20) percent of the high bid(s). Small businesses eligible and electing to use installment payments pursuant to § 95.816(d)(3) are required to bring their total deposits up to ten (10) percent of their winning bid. The remainder of the twenty (20) percent down payment must be submitted within five (5) business days of the grant of their license(s). See 47 C.F.R. § 1.2107(b)

(5) Full payment. Auction winners, except for small businesses eligible for installment payments, must pay the balance of their winning bids in a lump sum within five (5) business days following the grant of their license(s). The grant of a license(s) to an auction winner(s) will be conditioned on the timely payment of all monies due the Commission. See 47 C.F.R. § 1.2109(a).

(6) Default or disqualification, see 47 C.F.R. § 1.2104(g). (i) Sequential oral auctions. If a high bidder, after signing a bid confirmation form, fails to make the required down payment, fails to pay for a license, or is otherwise disqualified, it will be assessed a penalty equal to the difference between the its winning bid and the winning bid the next time the license is auctioned by the Commission, plus three (3) percent of the lower of these two amounts.

(ii) Single round sealed bid auctions. If a high bidder withdraws its bid prior to making the required down payment, it will be assessed a penalty equal to the difference between its bid and the next highest bid. If a high bidder, after having made the required down payment for a license, fails to pay the remaining amount for the license, or is otherwise disqualified, it will be assessed a penalty equal to the difference between its winning bid and the winning bid the next time the license is auctioned by the Commission plus three (3) percent of the lower of these two amounts.

(d) Designated entities. Designated entities are small businesses, and businesses owned by members of minority groups and/or women, as defined in 47 C.F.R. § 1.2110(b).

(1) Bidding credits. A winning bidder that qualifies as a business owned by women and/or minorities may use a bidding credit of twenty five (25) percent to lower the cost of its winning bid. A bidding credit is available for a license for either frequency segment A or frequency segment B in each service area. A bidding credit, however, may be applied to only one of the two licenses available in each service area.

(2) Tax certificates. Any initial investor in a business owned by minorities and/or women and who provides "start-up" financing, which allows such business to acquire a IVDS license(s), and any investor who purchases ownership in an interest in a IVDS license owned by minorities and/or women within the first year after license issuance, which allows for the stabilization of the entity's capital base, may, upon the sale of such investment or interest, request from the Commission a tax certificate, so long as such investor transaction does not reduce minority or female ownership or control in the entity below 50.1 percent. Any IVDS licensee who assigns or transfers control of its license to a business owned by minorities and/or women may request that the Commission issue it a tax certificate.

(3) Installment payments. Small businesses, including small businesses owned by women and/or minorities may elect to pay the full amount of their bid in installments over the term of their licenses. See 47 C.F.R. § 1.2110(d).

(e) Unjust enrichment. Any business owned by minorities and/or women that obtains a IVDS license through the benefit of tax certificates shall not assign or transfer control of its license within one year of its license grant date. If the assignee or transferee is a business owned by minorities and/or women, this paragraph shall not apply; provided, however, that the assignee or transferee shall not assign or transfer control of the license within one year of the grant date of the assignment or transfer.

9. Section 95.819 is revised to read as follows:

§ 95.819 License transferability.

(a) IVDS system licenses acquired through competitive bidding procedures may be transferred, assigned, sold, or given away only in accordance with the provisions and procedures set forth in 47 C.F.R. § 1.2111.

(b) Except for licenses acquired through competitive bidding procedures, the licensees may not transfer, assign, sell, or give the IVDS system licenses or any component CTS licenses to any other entity until the five year construction benchmark (50 percent coverage) has been met.

(c) Once the five year construction benchmark has been met, licensees of IVDS systems that were not acquired through competitive bidding may transfer, sell, assign, or give the IVDS system licenses together with all of its component CTS licenses to any other entity in accordance with the provisions of § 95.821. If the licensee sells or gives away the apparatus the new owner must obtain a new IVDS system license and CTS licenses before placing it in operation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

USVI Cellular Telephone Corporation — File No. I-T-C-94-219-TC

Application for Authority to Transfer Control of Section 214 Authorization from The David A. Bayer Trust to Cellular Communications of Puerto Rico, Inc.

ORDER AND AUTHORIZATION

Adopted: May 17, 1994; Released: May 25, 1994

By the Chief, International Facilities Division:

1. On March 1, 1994, USVI Cellular Telephone Corporation ("USVI") and The St. Thomas and San Juan Telephone Co., Inc. ("STSJ") (collectively "the Applicants") filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, requesting authority to transfer control of USVI from The David A. Bayer Trust ("the Trust") to Cellular Communications of Puerto Rico, Inc. ("CCPR"). The application was placed on public notice on March 9, 1994. No comments were received.

2. USVI is a privately held Delaware corporation, all of whose outstanding capital stock is owned by the Trust. USVI is a U.S. international common carrier, holding in its name a Section 214 authorization to provide international resale switched telephone services.[1] The transferee, CCPR, is a publicly traded Delaware corporation. CCPR holds through its subsidiaries and partnerships licenses in the Domestic Public Cellular Radio Telecommunications Service and the Domestic Fixed Point-to-Point Microwave Radio Service.[2]

3. The Applicants request authorization for a transfer of control of USVI pursuant to an agreement entered into between the Trust and CCPR, whereby CCPR will acquire from the Trust all of USVI's issued and outstanding capital stock in exchange for CCPR common stock. In addition, upon consummation of the proposed transfer of control, USVI will repay certain loans owed to the Trust or its affiliates. As a result, USVI will become a wholly-owned subsidiary of CCPR. The Applicants state that a grant of this application will serve the public interest because it will allow USVI to operate more efficiently and will potentially give the company access to expanded opportunities to compete in the international telecommunications market. The applicants state this will benefit the public by promoting competitive pricing and increased availability of service options.

4. After due consideration of the facts and circumstances presented by this application, we conclude that the transfer of control of USVI from The David A. Bayer Trust to Cellular Communications of Puerto Rico, Inc. would not adversely affect the public interest.

5. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that application File No. I-T-C-94-219-TC IS GRANTED and we consent to the transfer of control from the David A. Bayer Trust to Cellular Communications of Puerto Rico, Inc. of USVI's international Section 214 authorization File No. I-T-C-93-128.

6. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that USVI must continue to maintain a tariff for its authorized services.

7. IT IS FURTHER ORDERED that USVI must continue to file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

8. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

9. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *See* Commission's Public Notice, "Overseas Common Carrier Section 214 Applications - Actions Taken," Report No. I-6796, released May 12, 1993, indicating that application File No. I-T-C-93-128 was granted effective May 8, 1993. In addition, USVI holds Commission authorizations to provide cellular radiotelephone service on Frequency Block A in the St. Thomas RSA in the U.S. Virgin Islands, and common carrier microwave services in the Domestic Fixed Point-to-Point Microwave Radio Service. Authorization for the transfer of these authorizations is being handled in separate proceedings.

[2] In addition, a subsidiary of CCPR has filed an application for separate Section 214 authorization to provide international switched resale services. *See* File No. I-T-C-94-100.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

CENTURY CABLE
OF SOUTHERN CALIFORNIA

Petition for Stay of Local
Rate Order of City of
La Habra, CA

ORDER

Adopted: May 17, 1994; Released: May 17, 1994

By the Acting Chief, Cable Services Bureau:

1. Century Cable of Southern California ("Century") filed on April 28, 1994 an Emergency Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of La Habra, California ("City"), on March 28, 1994. The local rate order establishes a new schedule of basic service and equipment rates and directs Century to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. The main issue raised by Century in its petition centers on the regulatory treatment of Century's a la carte offerings.[1]

2. In a previous *Order*,[2] the Commission stayed a local rate order pending the resolution of a Letter of Inquiry issued by the Commission to a cable operator concerning its a la carte offerings. While a Letter of Inquiry has not been issued in this case, in order to minimize subscriber confusion and ensure regulatory consistency in this important area, we grant a forty-five (45) day stay pending resolution of the Letters of Inquiry with respect to the regulatory treatment of *a la carte* offerings.

3. During the period of this stay, Century is ordered, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Century to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Century actually charges its customers and the rates that the City has set for Century's basic service and equipment in its local rate order. Furthermore, Century is ordered to inform its subscribers, at its own expense, that it is setting up this escrow account and that subscribers who are moving away from La Habra should leave a forwarding address with Century so that they can receive any potential refunds due should the City's rate order be implemented.

4. Accordingly, IT IS ORDERED that the local rate order adopted by the City of La Habra, California establishing rates for Century Cable of Southern California's basic service tier and associated equipment is STAYED for forty-five (45) days. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Acting Chief, Cable Services Division

[1] A la carte offerings include channels that can be subscribed to individually or as part of a package.
[2] *Order* (Petition for Stay of Local Rate Order of City of Beverly Hills, CA), DA 94-463 (released May 9, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

WARNER CABLE
COMMUNICATIONS, INC.

Petition for Stay of Local
Rate Order of City of
Wadsworth, OH

ORDER

Adopted: May 17, 1994; Released: May 17, 1994

By the Acting Chief, Cable Services Bureau:

1. Warner Cable Communications, Inc. ("Century") filed on April 20, 1994 a Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of Wadsworth ("City") on March 25, 1994. The local rate order establishes a new schedule of basic service and equipment rates and directs Warner to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. The main issue raised by Warner in its petition centers on the regulatory treatment of Warner's *a la carte* offerings.[1]

2. In a previous *Order*,[2] the Commission stayed a local rate order pending the resolution of a Letter of Inquiry issued by the Commission to a cable operator concerning its *a la carte* offerings. While a Letter of Inquiry has not been issued in this case, in order to minimize subscriber confusion and ensure regulatory consistency in this important area, we grant a forty-five (45) day stay pending resolution of the Letters of Inquiry with respect to the regulatory treatment of *a la carte* offerings.

3. During the period of this stay, Warner is ordered, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Warner to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Warner actually charges its customers and the rates that the City has set for Warner's basic service and equipment in its local rate order. Furthermore, Warner is ordered to inform its subscribers, at its own expense, that it is setting up this escrow account and that subscribers who are moving away from Wadsworth should leave a forwarding address with Warner so that they can receive any potential refunds due should the City's rate order be implemented.

4. Accordingly, IT IS ORDERED that the local rate order adopted by the City of Wadsworth, Ohio establishing rates for Warner Cable Communication Inc.'s basic service tier and associated equipment is STAYED for forty-five (45) days. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Acting Chief, Cable Services Division

[1] *A la carte* offerings include channels that can be subscribed to individually or as part of a package.

[2] *Order* (Petition for Stay of Local Rate Order of City of Beverly Hills, CA), DA 94-463 (released May 9, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

CENTURY CABLE
OF SOUTHERN CALIFORNIA

Petition for Stay of Local
Rate Order of City of
Brea, CA

ORDER

Adopted: May 17, 1994; Released: May 17, 1994

By the Acting Chief, Cable Services Bureau:

1. Century Cable of Southern California ("Century") filed on April 28, 1994 an Emergency Petition for a Stay of Enforcement Pending Review of the local rate order adopted by the City of Brea, California ("City"), on March 24, 1994. The local rate order establishes a new schedule of basic service and equipment rates and directs Century to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. The main issue raised by Century in its petition centers on the regulatory treatment of Century's a la carte offerings.[1]

2. In a previous *Order*,[2] the Commission stayed a local rate order pending the resolution of a Letter of Inquiry issued by the Commission to a cable operator concerning its a la carte offerings. While a Letter of Inquiry has not been issued in this case, in order to minimize subscriber confusion and ensure regulatory consistency in this important area, we grant a forty-five (45) day stay pending resolution of the Letters of Inquiry with respect to the regulatory treatment of *a la carte* offerings.

3. During the period of this stay, Century is ordered, as it volunteered to do in its petition for stay, to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Century to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Century actually charges its customers and the rates that the City has set for Century's basic service and equipment in its local rate order. Furthermore, Century is ordered to inform its subscribers, at its own expense, that it is setting up this escrow account and that subscribers who are moving away from Brea should leave a forwarding address with Century so that they can receive any potential refunds due should the City's rate order be implemented.

4. Accordingly, IT IS ORDERED that the local rate order adopted by the City of Brea, California establishing rates for Century Cable of Southern California's basic service tier and associated equipment is STAYED for forty-five (45) days. This action is taken by the Acting Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that this Order is EFFECTIVE upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Acting Chief, Cable Services Division

[1] A la carte offerings include channels that can be subscribed to individually or as part of a package.

[2] *Order* (Petition for Stay of Local Rate Order of City of Beverly Hills, CA), DA 94-463 (released May 9, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 93-253

In the Matter of

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

SECOND REPORT AND ORDER

Adopted: March 8, 1994; Released: April 20, 1994

By the Commission:

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I. INTRODUCTION

1. On August 10, 1993, the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") added Section 309(j) to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-713 (the "Communications Act"). Section 309(j) gives the Commission express authority to employ competitive bidding procedures to choose among mutually exclusive applications for initial licenses. The Budget Act also requires the Commission to prescribe regulations to implement Section 309(j) within 210 days after enactment (March 8, 1994). The Commission adopted its Notice of Proposed Rule Making in this proceeding on September 23, 1993.[1] This Second Report and Order complies with the Budget Act's requirements.[2]

2. Under Section 309(j)(2)(B) of the Communications Act, the Commission must determine that use of a system of competitive bidding will promote the objectives described in Section 309(j)(3), which, in addition to those in Section 1 of the Communications Act,[3] are

> (A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;
>
> (B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;
>
> (C) recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and
>
> (D) efficient and intensive use of the electromagnetic spectrum.

A. Policy Objectives

3. Our purpose in this Second Report and Order is to promulgate competitive bidding rules that, in conjunction with our spectrum allocation rules, promote the public policy objectives set forth by Congress. We believe these objectives are embodied in two broad, basic Commission policy goals: promoting economic growth and enhancing access to telecommunications service offerings for consumers, producers, and new entrants. Structuring our rules to promote opportunity and competition should result in the rapid implementation of new and innovative services and encourage efficient spectrum use, thus fostering economic growth. We also can help to ensure access to new telecommunications offerings by ensuring that all customer segments are served, that there is not an excessive concentration of licenses, and that small businesses, rural telephone companies, and businesses owned by women and minorities will have genuine opportunities to participate in the provision of service. Providing new and innovative services on spectrum acquired via auction will offer licensees the opportunity to earn substantial revenues. We therefore anticipate that our auctions will recover a portion of the value of the public spectrum.

4. *Promoting Economic Growth.* The new wireless services that will be licensed by competitive bidding, such as Personal Communications Services ("PCS"), have great potential to stimulate economic growth and create thousands of jobs for Americans. To advance our statutory goals and to realize this potential, we seek to design a competitive bidding system that will: 1) award licenses through a process that will promote competition among a diverse group of service providers; 2) award licenses to the parties who will provide service and use spectrum most efficiently; and 3) award licenses expeditiously. We seek to implement a licensing system that maximizes the competitiveness of service provision among new licensees and existing providers and avoids creating barriers to efficient license aggregations. Achieving procompetitive economies is particularly important where new entrants (such as broadband PCS providers) will have to compete with existing services (such as cellular telephone providers).

5. Awarding licenses to those who value them most highly, while maintaining safeguards against anticompetitive concentration, will likely encourage growth and competition for wireless services and result in the

---

[1] Notice of Proposed Rule Making in PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) (hereinafter "NPRM" or "Notice"). The Commission received 222 comments, 169 reply comments and numerous *ex parte* presentations relating to this proceeding. A list of commenters and reply commenters is attached as Appendix A to this Second Report and Order. Commenters may be referred to herein by the abbreviations noted in Appendix A.

[2] To comply with the requirements of new Section 309(i)(4)(C) of the Communications Act, the Commission prescribed transfer disclosure requirements with respect to licenses awarded by random selection. *See* First Report and Order in PP Docket No. 93-253, FCC 94-32, released February 4, 1994 ("First Report and Order"), petitions for reconsideration pending.

[3] Section 1 of the Communications Act established the Commission, *inter alia*, "so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communications service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151.

rapid deployment of new technologies and services. Because firms have different views of the value of the licenses to be awarded, a firm that expects to be able to offer new or much lower cost services might be willing to pay more for a license than another firm that does not believe it can offer services as competitively. Under other licensing mechanisms, licenses may be more likely to change hands in the post-licensing market (as was true in past cases of cellular licenses).[4] Such secondary market transactions, however, often involve substantial additional costs. In general, competitive bidding is a licensing scheme that should place licenses in the hands of the parties able to use them most efficiently.

6. *Enhancing Access.* The competitive bidding rules we adopt are designed to enhance access to telecommunications services by encouraging broad participation in the provision of spectrum-based services and ensuring that spectrum-based services are available to a wide range of consumers. In order to encourage participation in the competitive bidding process by all qualified bidders, we have adopted a set of open competitive bidding processes and a menu of preferences for certain groups who might otherwise face entry barriers. We will use these preferences to promote the participation of small businesses, rural telephone companies and women- and minority-owned firms (collectively referred to as "designated entities") when we adopt service-specific competitive bidding rules, thereby meeting Congress's mandate by ensuring diversity in the ownership and management of telecommunications facilities, which in turn will increase the diversity of service offerings and better meet the needs of more consumers.

7. By establishing an efficient licensing mechanism that will promote the rapid deployment of a wide range of new products and services in all areas of the country, we seek to increase residential consumer and large user access to new technologies and services. Efficient provision of wireless service may also create alternatives for those not served by traditional wireline providers and should create competition for existing wireline and wireless services.

B. Summary

8. The following five sections of this Report and Order establish general rules and procedures to govern the competitive bidding process. In each of these sections we have selected the rules or procedures that should best serve our basic policy goals and therefore achieve Congress's objectives. Among other things, we are amending Part 1 of our Rules to add a new Subpart Q that would apply to competitive bidding generally. The new rules are set forth in Appendix B.

9. Section II of this Report and Order establishes rules governing the basic requirements for the types of services and licenses that may be subject to auctions. In Section III, we establish a range of competitive bidding methods and auction procedures from which we will choose for auctionable services. Because as yet the Commission has no actual experience with auctions, we will retain the ability to select among the procedures deemed appropriate for each service. This course also complies with the Congressional directive that we "design and test multiple alternative methodologies under appropriate circumstances." *See* Section 309(j)(3). In Section IV, we address procedural and payment issues regarding announcement of auctions and the filing of applications, bidder and licensee qualifications, pre-auction upfront payment and post-auction down payment, and penalties in the event of default or disqualification. These rules are intended to ensure that the competitive bidding process is limited to serious, qualified applicants. Section V establishes specific licensing safeguards, including anti-collusion and unjust enrichment provisions, that will deter possible abuses of the bidding and licensing processes. In Section VI, we identify preferences available for small businesses, rural telephone companies and businesses owned by members of minority groups and women to enhance their participation in the competitive bidding process and in the provision of spectrum-based services.

10. The five sections of this Report and Order summarized above establish general rules and regulations for competitive bidding that will apply to a variety of spectrum-based services licensed by the Commission. In the future, specific rules within the scope of these general rules will be adopted in a Report and Order for each service subject to competitive bidding. These subsequent Reports and Orders will set forth specific competitive bidding rules for each service that meets the criteria in Section 309(j)(2).

II. PRINCIPLES FOR DETERMINING WHETHER LICENSES MAY BE AUCTIONED

11. We discuss below the general statutory criteria that must be met before we may use competitive bidding to award licenses in a particular service. In particular, we also establish the tests we will use to determine whether services or classes of services are excluded from competitive bidding and make determinations with respect to some of these services. Our determinations as to whether specific services are subject to competitive bidding may be found in new Section 1.2102 of the Commission's Rules (*see* Appendix B).

A. General Requirement for Mutual Exclusivity Among Applications for Initial Licenses or Construction Permits Accepted for Filing

12. In the Notice, we observed that Section 309(j)(1) only permits use of competitive bidding if mutual exclusivity exists among applications that have been accepted for filing.[5] Therefore, we concluded, if mutual exclusivity does not exist, a license or class of service would not be subject to competitive bidding. In addition, we noted that Section 309(j)(1) expressly limits our authority to use competitive bidding to the award of "initial" licenses or construction permits. *See also* H.R. Rep. No. 111, 103d Cong., 1st Sess. 253 (1993) ("H.R. Rep. No. 103-111"). Of those commenters that address these issues, none expresses significant disagreement with these conclusions. *See, e.g.,*

[4] With respect to licenses obtained through random selection (lottery) proceedings, the First Report and Order in this docket addressed this issue by relying on existing build-out requirements and by imposing new transfer disclosure requirements.

[5] In general, the Commission considers two or more applications to be "mutually exclusive" if their conflicts are such that the grant of one application would effectively preclude, by reason of harmful electrical interference, the grant of one or more of the other applications.

comments of the Utilities Telecommunications Council. Accordingly, we incorporate these requirements in our rules as follows.

1. Shared Spectrum

13. We will exclude from competitive bidding those classes of services where mutual exclusivity between applications cannot exist because channels must be shared by multiple licensees.[6] In ¶ ¶ 145-146 and n.3 of the NPRM, we proposed to exclude these services from competitive bidding because there can be no mutual exclusivity. The comments generally agree that shared spectrum is inappropriate for competitive bidding for that reason. *See, e.g.*, comments of ITA and AAR.

14. For this reason, the General Mobile Radio Service, any private land mobile radio service below 470 MHz (with the possible exception of the 220 MHz service (*see* ¶ ¶ 27-29)), the 800 MHz air-ground radiotelephone service, and the Amateur Radio services, for example, will not be subject to competitive bidding. For the same reason, we also exclude several other services from competitive bidding. The comments broadly support our determinations with respect to mutual exclusivity. *See, e.g.*, comments of UTC.

2. Licenses Awarded on a "First-Come, First-Served" Basis

15. In some services currently regulated by the Common Carrier and Private Radio Bureaus, some licensing occurs on a "first-come, first-served" basis. At n.132 of the NPRM, we noted that the use of "first-come, first-served" procedures and waiting lists in the 800 MHz Specialized Mobile Radio (SMR) service has generally enabled us to avoid mutual exclusivity among 800 MHz SMR applications.[7] In addition, we have recently adopted rules for 929-930 MHz paging that rely on first-come, first-served procedures for licensing of channels on an "earned exclusivity" basis. *See* Report and Order, PR Docket No. 93-35, 8 FCC Rcd 8318 (1993) (PCP Exclusivity Report and Order).

16. The Notice tentatively concluded that if mutually exclusive applications for SMR[8] or Private Carrier Paging (PCP) frequencies occurred, they should be resolved by competitive bidding. *See* NPRM at ¶ 138 and at n.152. Several commenters favored the auctioning of some or all SMR frequencies. *See, e.g.*, comments of Geotek, GTE, E. F. Johnson, McCaw and Southwestern Bell. Others cautioned the Commission to not create mutual exclusivity inadvertently. *See, e.g.*, comments of NABER. Those commenters who argue that frequencies allocated to the SMR service should be exempted from competitive bidding generally base their arguments on the existing or future lack of mutual exclusivity. *See, e.g.*, comments of AMTA and Cencall. The comments confirm that under some of our existing first-come, first-served procedures for these services, mutual exclusivity will generally not occur because applications are processed in sequence based on filing date and, in some cases, file number. Commenters argue that this process serves the public interest and should be retained. *See, e.g.*, comments of NABER. We agree. Thus, we will not depart from existing first-come, first-served practices which work to avoid mutual exclusivity at this time. *See* Section 309(j)(6)(E) and comments of AMTA.

17. With respect to certain services regulated by the Common Carrier Bureau, however, "first-come, first-served" application procedures can, under the rules for those services, still result in mutual exclusivity. *See, e.g.*, Section 22.31(b) (filing of application opens up 60-day filing window during which competing applications may be filed). Mutual exclusivity in common carrier services generally, and in the Public Mobile Services specifically, will be resolved through the use of competitive bidding. *See* ¶ ¶ 59-62, *infra*. We recognize that our existing first-come, first-served procedures for certain services currently regulated by the Private Radio Bureau are not necessarily consistent with the way similar services are regulated by the Common Carrier Bureau. As we make clear in our decision in GN Docket No. 93-252, *see* n.15, *infra*, we intend in future proceeding to reconcile the regulatory treatment of these services. Such reconciliation may involve modification of existing SMR wait list procedures, as is currently proposed in PR Docket No. 93-144, 8 FCC Rcd 3950, 3958 (1993), and the use of auctions to resolve mutual exclusivity among initial applications for licenses in the Commercial Mobile Radio Services.

18. Similarly, the comments make clear that under our rules, mutual exclusivity among Community Antenna Relay Service (CARS) applicants does not arise because of a *de facto* "first-come, first-served" policy and that therefore, the CARS should not be subject to competitive bidding. *See* comments of Cablevision, *et al.* We agree, and will not subject CARS spectrum to competitive bidding.

3. Mutual Exclusivity Unknown

19. There are a number of other pending proceedings to establish rules for new or recently authorized services in which the likelihood of mutually exclusive applications is unknown or is debated by the commenters. *See, e.g.*, PR Docket No. 92-235, 7 FCC Rcd 8105 (1992) ("refarming" of private radio spectrum below 512 MHz); PR Docket No. 93-61, 8 FCC Rcd 2502 (1993) (Automated Vehicle Monitoring (AVM) in the 902-928 MHz band). Similarly, we do not currently know whether mutual exclusivity will exist in the Digital Audio Radio Service (DARS), or in the Low Earth Orbiting Satellite (LEOs) and the Mobile Satellite/Radiodetermination Satellite Services (MSS/RDSS). At this time it is premature to determine whether mutual exclusivity will or will not occur in the DARS, the AVM service, or the LEO and MSS/RDSS offerings. With respect to pending or future services and any others that are either

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[6] In this context, the term "shared" means a spectrum allocation scheme where each licensee has equal right to use the spectrum and no user has the right to exclusive use of an entire spectrum allocation for that service.

[7] "First-come, first-served" and wait list procedures apply only to 800 MHz SMRs and have not applied when multiple mutually exclusive applications were received when the Commission opened a filing window inviting the submission of applications for licenses to operate on new SMR spectrum. *Cf.* ¶ 63, *infra*. We do not currently accept new 900 MHz SMR applications and we are currently considering proposals to restructure licensing of this service.

[8] As indicated in the NPRM at ¶ 138, we mean the 200 channel pairs at 900 MHz and the 280 channel pairs at 800 MHz available to SMRs under Section 90.617(d) of the Commission's Rules. We do not include those channels from other frequency pools which may be licensed to SMRs through our intercategory sharing rules or to General Category channels. *See* ¶ 47, *infra*.

experimental or interim in nature, the Commission cannot at this time presume that the prerequisites for competitive bidding will exist when we award initial licenses. We will, however, continue to monitor developments in these areas to determine, at a later date, whether competitive bidding for such spectrum might ultimately be appropriate.[9]

B. General Requirement of Subscribers

20. Section 309(j)(2)(A) requires that, to be subject to competitive bidding, the licensee must receive compensation in exchange for providing transmission or reception capabilities to subscribers. Thus, we will exclude from competitive bidding those services or classes of services in which licensees do not receive compensation from subscribers and, hence, are outside the scope of Section 309(j)(2)(A).

1. Broadcast Services Exclusion

21. Section 309's legislative history makes clear that applications for licenses to provide traditional over-the-air broadcast services should not be subject to competitive bidding. *See* H.R. Rep. No. 103-111 at 253. Consistent with the clear legislative intent, we proposed in the NPRM to exclude from the competitive bidding process broadcast television (VHF, UHF, LPTV) and broadcast radio (AM and FM).[10] Those commenters who address this issue generally agree with the Notice. *See, e.g.*, comments of AMTA and MSTV/NAB. One commenter, however, argues that traditional broadcast spectrum should be auctioned. *See* comments of Brown and Schwaninger.

22. Under the plain language of the statute, traditional broadcast services are excluded from competitive bidding because licensees do not receive compensation from subscribers. Moreover, the legislative history confirms Congress's clear intent to exclude these licenses and construction permits. We therefore exclude from the competitive bidding process the broadcast television (VHF, UHF, LPTV) and broadcast radio (AM and FM) as well as the ITFS services.[11] The for-profit subsidiary communications services transmitted by broadcast licensees on subcarrier frequencies that are indivisible from the main broadcast signal and similar services will also be excluded from the competitive bidding process given Congress's express intent to this effect. *See* H.R. Rep No. 103-111 at 253.

2. "Private Services" Exclusion

23. As we pointed out in the NPRM, the legislative history also refers to "private services" as those that do not involve the receipt of compensation from subscribers and thus are not to be subject to competitive bidding. In accordance with the plain language of the statute, we exclude from competitive bidding those services or classes of services in which licensees do not receive compensation from subscribers and, hence, are outside the scope of Section 309(j)(2)(A).

24. The House Report states that the enactment of competitive bidding authority should not affect the manner in which the Commission issues licenses for virtually all private services, including frequencies utilized by Public Safety Services, the Broadcast Auxiliary Service, and for subcarriers and other services where the signal is indivisible from the main channel signal. H.R. Rep. No. 103-111 at 253. In the context of determining eligibility for competitive bidding, however, the term "private services" was not intended to have the same meaning that the Commission has ascribed to private services in other contexts. *See, e.g.*, comments of AT&T and of NYNEX.[12]

25. The comments strongly support our "private services" analysis, including our tentative conclusion that the term "private services" referred to services that did not involve the payment of compensation to the licensee by subscribers, *i.e.*, that were for internal use. *See, e.g.*, comments of the American Petroleum Institute. We affirm our tentative conclusion. Consistent with the express intent of Congress, we also affirm that frequencies allocated to the Public Safety Services, or the Broadcast Auxiliary Services under Subparts D, E, F and H of Part 74 and shared with the Cable Television Relay Service under Part 78 of our Rules, will be exempt from competitive bidding. We also hold that subcarrier-based and similar services, such as those provided via the Vertical Blanking Interval, and for-profit subsidiary communications services transmitted on subcarriers within the FM baseband signal (see Section 73.295), will be exempt from competitive bidding where the underlying service is exempt. *See* H.R. Rep. No. 103-111 at 253. *Accord*, comments of MSTV/NAB.[13]

26. As we proposed in the NPRM at ¶ ¶ 27 and 145-146, and at nn. 123, and 157, application of the private services test leads us to conclude that certain additional services and classes of services should be excluded from competitive bidding as well. These include the 220 MHz channels

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[9] We note that a number of commenters advance additional reasons why competitive bidding for these services at s time appears to be premature. *See, e.g.*, comments of TRW. Furthermore, given the pendency of PR Docket Nos. 92-235 and 93-61, it would be speculative for us to decide on the auctionability of frequencies that may or may not become available as a result of those proceedings. *Cf.* comments of AAA.

[10] Although some television licensees may receive compensation from cable television operators under the "retransmission consent" provisions of the Cable Television Consumer Protection and Competition Act of 1992, these licensees will not be subject to competitive bidding. H.R. Rep. No 103-111 at 254. Similarly, Instructional Television Fixed Service (ITFS) will not be subject to competitive bidding even if ITFS licensees receive payments from Multichannel Multipoint Distribution Service licensees for use of ITFS spectrum because ITFS licensees do not receive compensation from "subscribers" as that term is used in Section 309(j)(2). *See* H.R. Rep. No. 213, 103d Cong., 1st Sess. (1993) (Conference Report) at 481-82.

[11] We defer consideration of whether licenses to provide Direct Broadcast Satellite (DBS) service should be subjected to competitive bidding until the nature of that service becomes clearer.

[12] We thus affirm the difference between the meaning of "private service" in the Section 309(j) auction context and "private mobile service" as that term has been defined in new Section 332(d)(3) as added by Section 6002 of the Budget Act. Private mobile radio services are distinguished from commercial mobile radio services in Section 332 on the basis of several criteria that are not relevant to Section 309(j), *e.g.*, whether interconnected mobile service is provided for a profit to the public or a substantial portion of the public. *See* Section 332 Second Report and Order. Most commenters addressing this issue agree with this analysis. *See, e.g.*, comments of AT&T, API and AAR.

[13] *See also* subsection B.1., *supra* (Broadcast Services Exclusion).

reserved for private service (including public safety), 800 MHz trunked systems operated on a not-for-profit, cooperative sharing basis, or 800 or 900 MHz systems for internal use in non-SMR frequency pools.[14] Most of the comments which address this issue support our proposal. *See, e.g.,* comments of API.

27. We will also defer a decision on whether to auction 220 MHz "local" licenses should the Commission need to conduct additional licensing in that class of service. As we pointed out in the NPRM, the 220 MHz service is a new service and, with the exception of those 220 MHz frequencies the Commission reserved for specific purposes (*e.g.,* the 220 MHz nationwide "commercial" and "noncommercial" channels and the 220 MHz channels reserved for public safety purposes), the 220 MHz "local" channels may be used for private service or for the provision of service to subscribers. Because the service was new, we asked commenters to submit information on the likely use of these frequencies.

28. Almost every commenter who addressed this issue argued that it is still too early to classify the 220 MHz local channels as likely to be used for the provision of service to subscribers or for private use. *See, e.g.,* comments of AMTA, Roamer One, UTC and E.F. Johnson, reply comments of TDS. Based on the record, we will temporarily defer any decision on whether to auction 220 MHz local channels, although our observations of the development of this service to this point lead us to tentatively conclude that it is likely to be a subscriber based service.[15] When the nature of this service becomes clearer, as we anticipate, we will decide whether future applications for 220 MHz local service should be subject to competitive bidding.[16]

29. Future initial applications for 220 MHz Commercial Nationwide licenses will be auctioned if the Commission ever accepts mutually exclusive initial applications again for that service, as it is clear that they are within the ambit of Section 309(j). As we stated at ¶ 135 of the NPRM, these frequencies have been designated for use principally to provide for-profit service to subscribers. *Accord,* comments of NABER. Future initial applications for 220 MHz Noncommercial Nationwide licenses will not be auctioned; as licenses limited to the provision of private service, they are outside the ambit of Section 309(j). *See* comments of UTC.

C. Principal Use Requirement

30. Under Section 309(j)(2)(A), for spectrum to be subject to competitive bidding, the "principal use" of that spectrum must involve, or be reasonably likely to involve, the transmission or reception of communications signals to subscribers for compensation. The Commission has a number of service classifications where a licensee may provide service to itself only, offer communications service to subscribers for compensation, or provide service both to itself and to subscribers.[17] By directing the Commission to identify the "principal use" of spectrum, Congress recognized the existence of such mixed use services.[18]

31. To address these situations and to comply with the statutory intent, we proposed that, in order to be subject to auctions, at least a majority of the use of a Commission regulated service or class of service must be for service to subscribers for compensation. NPRM at ¶ 31. We asked commenters to address the merits of measuring or estimating the extent of private or internal use by information throughput or by the amount of time or spectrum that is devoted to private use. *Id.* at ¶ 32, n.14. We also sought comment on an alternative proposal, a so-called "contaminated band" proposal, under which a service or class of service could be subject to competitive bidding if there were any use, no matter how minimal, in which one or more licensees within a given service or classification of service used that spectrum for the provision of service to

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[14] The fact that SMRs might occasionally be able to access these frequencies through our intercategory sharing rules would not change this result inasmuch as the principal use of these frequencies is clearly for private services. *See* comments of API. It is also clear that the six frequency pairs in the 900 MHz band set aside for the Advanced Train Control Service meet the private service test and should be excluded from competitive bidding. *See* comments of AAR.

[15] This decision is not inconsistent with our decision in GN Docket No. 93-252, Implementation of Sections 3(n) and 332 of the Communications Act, FCC 94-31, released March 7, 1994, ("Section 332 Report and Order") that some 220 MHz local licensees will be Commercial Mobile Radio Service (CMRS) and some will not, depending on whether they meet the statutory criteria for Commercial Mobile Radio Service. *See* Section 332 Report and Order at ¶ 95. Unlike the decision on whether 220 MHz local licensees are CMRS, which is made on a license by license basis, the decision on whether 220 MHz local channels will be subject to competitive bidding will depend on the principal use of that entire class of service. Additional observation of the manner in which the 220 MHz local service develops will provide us with a firmer basis on which to decide whether competitive bidding is appropriate for this class of service.

[16] The Commission has already conducted a lottery for 220 MHz local licenses for the entire United States and granted every license it could from among the applications it received. Licensees are currently in the process of constructing their systems. It is unclear which, if any, of these licensees will have their licenses cancelled for failure to construct or for other reasons. As such, unlike other services, *e.g.* the Interactive Video Data Service (IVDS), there is no immediate need to decide whether future mutually exclusive applications in this service should be subject to competitive bidding before service can be made available to the public.

[17] An example of such a service is the Private Operational Fixed Service ("POFS") licensed under Part 94 of the Commission's Rules.

[18] *See* 47 U.S.C. § 309(j)(3) (Commission to identify "classes of licenses" to be issued by competitive bidding); H.R. Rep. No. 103-111 at 254 (Section 309(j)(2) determination to be made when a service or class of service is defined by Commission).

subscribers for compensation.[19] We received a range of suggestions from commenters on this issue. *Compare* comments of AT&T, ITA and Domestic Automation (favoring principal use determinations on a service or class of service basis) *with* comments of AAA (suggesting a license-by-license approach) and comments of PacBell (supporting the "contaminated band" proposal).

32. As explained below, we will look to classes of licenses and permits to determine their "principal use." In order to determine the principal use in a service, we will compare the amount of non-subscription use made by the licensees in a service as a class with the amount of use rendered to eligible subscribers for compensation on the basis of information throughput, time, or spectrum. We also adopt our proposal that at least a majority of the use of a Commission regulated service or class of service must be for service to subscribers for compensation. We believe that the so-called "contaminated band" proposal is at odds with the express statutory language requiring that the principal use, not any use, of the service or class of service in question be for subscription-based purposes before auctions are permitted.

33. We also reject the arguments by commenters such as AAA that the Commission must examine individual applications to determine each licensee's principal use of the spectrum. We do not agree that the Budget Act mandates that the "principal use" determination be made on a license-by-license basis. Although Section 309(j)(2)(A) of the Act does refer to licensees, it requires that the "principal use of the *spectrum*" be for compensation (emphasis added). Had Congress intended the principal use determination to be made on a license by license basis, the Budget Act would have specifically stated this requirement. Also, Section 309(j)(3) refers to "each *class* of licenses or permits that the Commission grants through the use of a competitive bidding system . . ." (emphasis added). Moreover, the House Report states that the principal use determination should be made when a service or class of service is created by the Commission and that the Commission should review existing services, not licenses, to see if they meet the principal use test. H.R. Rep. No. 103-111 at 8.

34. We therefore believe that the best course is to evaluate classes of licenses and permits, rather than individual licenses, to determine the "principal use" of the spectrum, and further believe that approach is most consistent with Congressional intent.[20] In order to determine the principal use in a service, we proposed to compare the amount of non-subscription use made by the licensees in a service as a class with the amount of use rendered to eligible subscribers for compensation on the basis of information throughput, time, or spectrum. At least a majority of such use would have to be for service to subscribers for compensation in order for a service to be subject to competitive bidding. *See* NPRM at ¶ 32, n.14. This approach found support in the comments (*see, e.g.*, comments of AAR), and we adopt it.[21]

35. For existing services, our experience in regulating communications services will help us to accurately determine principal use. For example, in our experience and using any of the measurements that we proposed, the vast majority of use of the POFS as a class is for private or internal use by the licensee or its affiliates for which no compensation of any kind is paid. Our interpretation of the principal use test led us to propose that applications in the 470-512 MHz private land mobile services also should not be subject to competitive bidding.[22] NPRM at nn.16 and 154. Most commenters agreed with our view of the principal use of these two classes of service. *See, e.g.*, comments of APCO, AAR, UTC and API. We therefore adopt our proposal to exclude the 470-512 MHz private land mobile services and the POFS[23] from competitive bidding.[24] Finally, the few comments we received on the subject argue strongly that the MAS is principally used for private service and are unrebutted. *See, e.g.*, comments of UTC, Fisher Wayland, and Domestic Automation. The comments comport with our own experience and the MAS will therefore be exempted from competitive bidding.[25] We will make other determinations on principal use with regard to other specific services in future Reports and Orders.

36. We also decline at this time to adopt APCO's proposal to exempt from competitive bidding any radio service that has or is likely to have significant use by state and local government licensees. We have already exempted from competitive bidding the public safety services over which APCO expressed the most concern (*see* ¶ 47, *infra*), and believe it would be premature and speculative to try to ascertain what other services are likely to be significantly used by state and local government licensees.

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[19] We noted, however, that such an approach seemed inconsistent with the "principal use" standard. NPRM at ¶ 33.

[20] NYNEX's comments suggested three other tests: (1) a service would be presumed "private" based on majority use of the spectrum but parties would have an opportunity to rebut that presumption; (2) any license issued by the Commission in a service classified as "private" should be conditioned on the licensee's principal use of that spectrum for that purpose; violation of this condition would result in license forfeiture or a penalty; and (3) a service that might be considered private based upon majority use should nevertheless be subject to auction if more than $100,000 is received as compensation from subscribers. We reject NYNEX's last suggestion as essentially equivalent to the "contaminated band" proposal rejected above. NYNEX's first two suggestions appear to be variants of the classification by license scheme we have rejected for the reasons previously stated.

[21] As pointed out by AT&T in its comments, there is no way to anticipate today all of the possible uses of the electromagnetic spectrum. Thus, with respect to the measures to be used in making the principal use determination, we will, as AT&T suggests, retain the ability to use any of the measurement methods described above, as proposed at n.14 of the NPRM.

[22] Most of these frequencies are shared, and therefore applications will not be mutually exclusive with one another. *See* comments of UTC.

[23] We do not adopt API's suggestion that the 18 GHz POFS Video Entertainment stations be treated separately from the rest of the POFS inasmuch as it is speculative whether these stations will function as private carriers as API asserts.

[24] Because the principal use of these classes of services is for private service, in the event that mutual exclusivity should occur among applicants for initial licenses, we are permitted to use lotteries to resolve that mutual exclusivity. *See* Section 309(i)(1).

[25] Since we have found the principal use of MAS to be for private service, Section 309(j) does not authorize us to use competitive bidding to award licenses for mutually exclusive pre-July 26, 1993 MAS applications pending before the Commission. We will therefore lottery these applications.

D. Initial and Modification Applications

37. As we pointed out in the NPRM, Congress apparently expected that applications to modify existing licenses would not be subject to competitive bidding.[26] While the commenters generally agree that modification applications should not be so subject, several commenters ask that the Commission clarify that certain types of mutually exclusive applications to modify existing licenses (*e.g.*, to add radio channels to an existing system), may be so different in kind or so large in scope and scale as to warrant competitive bidding if mutual exclusivity exists. *Cf.* comments of RAM and NABER.[27] Where a modification would be so major as to dwarf the licensee's currently authorized facilities and the application is mutually exclusive with other major modification or initial applications, the Commission will consider whether these applications are in substance more akin to initial applications and treat them accordingly for purposes of competitive bidding.

38. We believe that there is merit in this course. It comports with our objectives of increasing competition and awarding spectrum to those who value it most highly. Accordingly, though as a general rule the Commission will regard mutually exclusive applications to modify existing licenses as not subject to competitive bidding, we may, on our own motion or in response to a petition from an interested party, determine that a major modification application in a particular service, if it is mutually exclusive with other applications, should be treated as an initial application and be subject to competitive bidding.

39. Similar questions of auctionability arise when applicant A files an application to modify its existing license, which in turn opens a window for another applicant, B, to file a competing initial application which is mutually exclusive with that of A. *See, e.g., Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987).[28] The statute requires the existence of "mutually exclusive applications [that are] accepted for filing for *any* initial license or construction permit," 47 C.F.R. § 309(j)(1) (emphasis supplied), but the legislative history makes clear that competitive bidding is not permitted "in the case of a renewal or *modification* of the license." H.R. Rep. No. 103-111 at 253 (emphasis supplied). Were we to read the statute literally, since one of the two applications in the example above is an initial applications, competitive bidding is arguably applicable. But such a result would also lead to competitive bidding by a modification applicant.

40. Given this apparent lack of clarity, we intend to deal with these situations on a case-by-case basis as it is impossible to know the factual context within which such mutual exclusivity might occur. We retain the authority to use comparative hearings to resolve mutual exclusivity between initial and modification applications, but also believe that competitive bidding may be appropriate in some of these cases as well.[29]

E. Intermediate Links

41. In the NPRM, we proposed that a license for frequencies used in a service as an "intermediate link" in the provision of a continuous, end-to-end service, *i.e.*, one used by a licensee as part of a service offering to subscribers, but not one on which subscribers directly send or receive communications signals, would be subject to competitive bidding. NPRM at ¶ 29.[30] We believed that such a result would be administratively efficient because it would eliminate the necessity of determining the exact nature of the use to be made of a particular license by a particular applicant.

42. As noted, in order for a license to be subject to competitive bidding, Section 309(j)(2)(A) requires that the subject spectrum enable subscribers to "receive communications signals" or to "transmit directly communications signals." The comments strenuously and almost unanimously opposed the Commission's proposal, in part on the basis that by definition, an intermediate link cannot transmit communications signals directly. *See, e.g.*, comments of AT&T. Other commenters believe that auctions would not promote the objectives of Section 309(j)(3).

43. We have decided not to adopt the NPRM's proposal. Before employing competitive bidding for intermediate links, we are still required to determine that mutual exclusivity exists and that such bidding would promote the objectives of Section 309(j)(3)(A) through (D). As to mutual exclusivity, we note that on those types of frequencies most often utilized as intermediate links, mutual exclusivity is very rare because of frequency coordination efforts made prior to the time an application is filed. *See, e.g.*, reply comments of Alcatel. We are also concerned that auctioning intermediate links might lead to significant delays in

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[26] *See* NPRM at ¶ 22; *see also* H. R. Rep. No. 103-111 at 253. *Cf.* Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987).

[27] The May 14, 1992 Public Notice (Mimeo No. 23115) referenced by Alcatel in its reply comments was not issued for the purpose of determining what constitutes a "modification" of a microwave license. Therefore, its comment is inapposite. *Cf.* 47 C.F.R. Sec. 94.45.

[28] This scenario was raised by AllCity Paging in its comments. AllCity noted that under Section 22.33(c)(1) of our Rules, when a common carrier public mobile service applicant seeks to add one or more transmitters and which meets certain criteria is faced with a mutually exclusive initial applicant, the first applicant is entitled to request a comparative hearing to determine which application should be granted. AllCity requests the retention of this procedure notwithstanding that the Commission has proposed elimination of this rule in CC Docket No. 92-115, 7 FCC Rcd 3658 (1992). Telocator, however, suggested that such mutual exclusivity be resolved through competitive bidding.

[29] In the specific hypothetical raised by AllCity Paging, for example, we are inclined to believe that if the modification application that is filed by the first applicant is substantial enough to require prior permission from the Commission, *see, e.g.*, Section 22.9(d) of our Rules, it is the equivalent of a new or initial application and we are thus permitted to use auctions to resolve the mutual exclusivity.

[30] Examples of such intermediate links include cellular carriers transmitting subscriber traffic between cell sites and its Mobile Telephone Switching Office, or a local exchange telephone company using microwave links as one means of transmitting local exchange telephone service. Similarly, point-to-point microwave frequencies in the CARS are often used by cable television companies to transmit television programming to different points within or among systems although not directly to their subscribers. Another type of intermediate link is the so-called "MSS feederlink" discussed by several of the commenters. *See* reply comments of Loral Qualcomm.

the provision of services thus hindering the development and rapid deployment of new technologies, products and services for the benefit of the public. *See, e.g.*, comments of Southwestern Bell. Further, such auctions would impose significant administrative costs on licensees and on the Commission, particularly relative to the likely value of these licenses. It is thus unclear whether using auctions to award licenses for intermediate links would promote the objectives in Section 309(j)(3)(C). Therefore, intermediate links, including MSS feederlinks, CARS frequencies,[31] and point-to-point microwave frequencies regulated under Parts 21[32] and 94[33] of the Commission's rules will not be subject to competitive bidding.[34]

F. Services For Which Competitive Bidding Would Not Further Section 309(j)(3) Objectives

44. As exemplified above in our consideration of whether intermediate links should be auctioned, a system of competitive bidding may only be used if it would promote the objectives of Section 309(j)(3), even if the principal use of the spectrum otherwise satisfies the requirements for competitive bidding. Based on the comments, we have identified a number of circumstances where auctions do not appear to be consistent with these statutory objectives or are otherwise inconsistent with Congressional intent.

45. In response to n.174 of the NPRM, a number of commenters noted that the Basic Exchange Telephone Radio Service (BETRS) and certain paging services use the same spectrum and that mutual exclusivity between them was possible. *See, e.g.*, comments of Interdigital. The Rural Radio Service, including the BETRS, is a fixed service regulated under Subpart H of Part 22 of our Rules. The frequencies in these services are most commonly used in the provision of telephone service to remote locations where it is impractical or uneconomic to provide such service via landline. *See* comments of GTE. Because rural radio, including BETRS, frequencies are co-primary with certain common carrier mobile services, it is possible that mutual exclusivity may occur between BETRS applications and other common carrier applications.[35]

46. The commenters argue that it would not serve the public interest to subject rural radio frequencies to competitive bidding because doing so would frustrate the important goals of universal service embodied in Section 1 of the Communications Act, which are incorporated by reference in Section 309(j)(3). *See* comments of NTCA. We agree. It would not serve the public interest for the Commission to establish services such as the BETRS as a potential less costly alternative to landline service[36] and then require a BETRS applicant to bid against a radio common carrier applicant for those frequencies. *Accord,* reply comments of Southwestern Bell. Therefore, we will not conduct auctions to resolve mutual exclusivity between initial BETRS or rural radio applications and common carrier mobile service applications.[37] We note that this is consistent with our decision on General Category frequencies discussed below.

47. In the NPRM, we proposed to exclude from competitive bidding procedures certain private radio channels known as the General Category[38] channels as well as other classes of frequencies subject to intercategory sharing. *See* NPRM at ¶ ¶ 139-141. These frequencies can be used by both SMRs, who are commercial mobile radio service providers, as well as for internal private service. Subjecting the General Category or non-SMR intercategory shared frequency pools to competitive bidding, however, might force police departments, for example, to bid against SMRs for spectrum. This would be contrary to Congressional intent and disserve the public interest. The comments strongly support this conclusion. *See* comments of APCO, AMTA, and AAA. Therefore, we will exclude from competitive bidding General Category channels and other intercategory classes of frequencies.[39]

G. Specific Services Subject to Competitive Bidding

48. In ¶ ¶ 114-166 of the NPRM, we identified a number of services and classes of services that appeared to fall within the ambit of the competitive bidding provisions of the Budget Act if mutually exclusive initial applications were accepted for filing. Most spectrum-based common carrier services, some private mobile radio services,[40] some

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[31] As we pointed out earlier at ¶ 18, CARS applications are not subject to mutual exclusivity and are therefore exempt from competitive bidding for this reason as well.

[32] In the event that we receive mutually exclusive applications for common carrier point-to-point microwave facilities that would provide service to subscribers, we might conduct comparative hearings to resolve such mutual exclusivity. *See* Section 309(i)(1)(B). We expect such instances to be rare, however.

[33] As noted elsewhere, Part 94 point-to-point microwave users are exempt from competitive bidding because the principal use of these frequencies is for private service. *See, e.g.*, comments of APCO.

[34] In view of our intent not to auction any point-to-point microwave licenses, whether private or common carrier, our proposal to exempt from competitive bidding those entities forcibly relocated by our orders in ET Docket No. 92-9 is moot. *See* NPRM at ¶ 128, n.118.

[35] Because local exchange carriers generally operate under exclusive franchises, we do not anticipate mutual exclusivity between BETRS applications.

[36] *See* Basic Exchange Telecommunications Radio Service, 3 FCC Rcd 214 (1988).

[37] Because the principal use of both of these services is for the provision of service to subscribers for compensation, the Commission would have to resolve such mutual exclusivity through a comparative hearing. *See* Section 309(i)(1). We are confident, however, that applicants can negotiate to resolve such mutual exclusivity.

[38] General Category channels are frequencies at 800 MHz that have been allocated to eligibles for conventional operations. *See* 47 C.F.R. § 90.615. Some of the General Category channels may be licensed for commercial use by Specialized Mobile Radio licensees.

[39] In addition, it also appears that General Category channels are not subject to competitive bidding because they are not principally used for subscriber based services. *See* comments of UTC. Similarly, channels in non-SMR frequency pools may in some cases be accessed by SMRs, but only if SMR frequencies are unavailable. *See, e.g.*, Section 90.621(g) of our rules. The principal and primary use of these non-SMR frequencies is for the services to which they have been allocated. *See, e.g.*, Section 90.617.

[40] A licensee could be classified as a provider of private mobile radio service for purposes of Section 332 and still be subject to competitive bidding under Section 309(j). An SMR that provides only dispatch service and is not interconnected with the public switched network, for example, would be regulated as a private mobile radio service under Section 332, yet still be

private fixed services,[41] and commercial mobile radio services will be subject to competitive bidding, assuming the other statutory criteria are met. We have determined that several of those services and classes of services should be auctioned, and discuss them further below.

1. Interactive Video Data Service

49. In ¶ ¶ 142-144 of the NPRM, we proposed to auction any future mutually exclusive applications for the Interactive Video Data Service (IVDS) for we believed that this new service fulfilled all of the statutory prerequisites for competitive bidding. A number of commenters speculate that IVDS will have no subscribers on the basis that the service will be provided free to consumers and supported by advertising revenues or revenues from transactions conducted using the interactive features of IVDS. They therefore urge that the Commission not utilize auctions to award IVDS licenses in the future. *See, e.g.*, comments of Quentin L. Breen, Independent Cellular Consultants, Professor Andrea Johnson, and Richard L. Vega Group and reply comments of America 52 East, Kingswood Associates and Harry Stevens, Jr.[42]

50. We disagree. While it may be true that the business plans of some would-be IVDS applicants contemplate that the consumer of the IVDS service will pay nothing for the response transmitter units (RTUs), we remain convinced that IVDS will primarily "provide information, products, or services to individual subscribers."[43] We note, for example, that Radio Telecom and Technology, Inc. (RTT), a developer of IVDS equipment and a longtime participant in the Commission's proceedings which created IVDS, argues that IVDS licenses should be awarded pursuant to competitive bidding.[44] Moreover, the Commission recently received an *ex parte* presentation from Eon Corporation (formerly TV Answer, Inc.). Eon is a developer of IVDS equipment and a longtime participant in our proceedings creating IVDS, and has obtained FCC certification for its equipment. Eon indicates that IVDS will include a substantial number of services that are compensated by subscribers. Eon further believes that in order to be successful, IVDS cannot be supported on a non-subscription, free to the consumer basis.

51. Based on the record, we must try to predict whether the principal use of IVDS will be "reasonably likely to involve" the receipt of compensation from subscribers. The record indicates that it will. We accord great weight to the views of RTT and Eon because these parties have been associated with IVDS since its early days. They have invested substantial amounts of time and money in developing the service and are in a position to understand the likely use of IVDS.

52. We also believe that the use of competitive bidding will promote the objectives of Section 309(j)(2)(B) as follows. First, the use of auctions for IVDS is likely to contribute to the rapid deployment of this new technology and will promote the efficient and intensive use of the electromagnetic spectrum. When we established the IVDS, we prescribed an application fee of $1400 and still received hundreds of applications for the first nine IVDS markets. Since we have lowered the IVDS application fee from $1400 to $35,[45] we anticipate being inundated with thousands of applications. Given the length and expense of comparative hearings, we do not believe that such hearings are a realistic alternative means of resolving mutual exclusivity among-IVDS applicants. Without auctions, we fear that licenses would not quickly be awarded to parties able to efficiently use them, which, combined with the administrative burdens of processing thousands of applications and the associated litigation that is likely to ensue, will unreasonably delay deployment of this new service. Second, under the rules we shall establish for designated entities, use of auctions to award IVDS licenses should also fulfill the Congressional objective of promoting economic opportunity and competition as well as dissemination of licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. Finally, auctions will also recover for the public a portion of the value of the public spectrum.

53. We note in addition that the use of auctions for IVDS is fully consistent with the intent of Congress. Congress clearly envisioned that the IVDS would be subject to competitive bidding, for the Budget Act's legislative history states that the exception permitting the Commission to conduct lotteries for pre-July 26, 1993 applications would "permit the Commission to conduct lotteries for the nine Interactive Video Data Service markets for which applications have already been accepted. . . ."[46] Had the Congress not expected that the Commission would auction IVDS applications generally, it seems that there would have been no need for this statement. We therefore hold that auctioning of mutually exclusive IVDS applications will further the objectives of Section 309(j)(3).[47]

2. Personal Communications Services

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subject to competitive bidding if mutual exclusivity existed inasmuch as we have generally classified all frequencies allocated to SMRs as subject to competitive bidding. *Compare* ¶ 63, *infra*, with Section 332 Report and Order at ¶ 90.

[41] *See, e.g.*, the discussion concerning the Interactive Video Data Service, *infra*.

[42] Others, however, urge that future mutually exclusive IVDS applications be auctioned. *See* comments of the Chase McNulty Group, NYNEX, and Radio Telecom and Technology, Inc.

[43] *See* Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video Data Service, 7 FCC Rcd 1630, 1637 (1992).

[44] We discount America 52 East's speculation in its reply comments that RTT's comments are unworthy of consideration because they are based solely on the latter's pecuniary interest. America 52 East's assurances that to receive IVDS service a customer need only go to any electronics store and purchase the necessary equipment and that there will be no subscription fee are similarly unconvincing since IVDS is not yet available.

[45] *See* Second Reconsideration in PR Docket No. 91-2, 8 FCC Rcd 2787 (1993).

[46] *See* Conference Report at 498. The Commission held lotteries on September 15, 1993, for licenses in first nine IVDS markets, applications for which were filed prior to July 26, 1993.

[47] Because we classify IVDS as a whole as subject to competitive bidding, we disagree with the comment of Professor Andrea Johnson, who seems to argue for a license-by-license classification of IVDS, an approach we reject.

54. We proposed in §¶ 115-130 of the NPRM to award both narrowband and broadband PCS licenses by competitive bidding in case of mutual exclusivity and tentatively concluded that PCS would meet all of the prerequisites for such bidding, including the requirement of subscribers. We noted our expectation, judging from the nature of the comments and the myriad *ex parte* presentations that we have received in the various PCS proceedings, as well as the identity of the commenters, that many PCS licensees will operate in the manner contemplated by new Section 309(j)(2)(A). *See* NPRM at ¶ ¶ 115-119. The vast majority of the commenters who addressed this issue either agreed that mutually exclusive PCS applications should or must be subject to the competitive bidding process, or simply assumed that such applications will be auctioned. *See, e.g.,* comments of Arch Communications, BellSouth, Bell Atlantic, TDS, Time Warner, and UTC, reply comments of Telocator.

55. Only one commenter seriously disputed the Commission's tentative conclusion that PCS licenses should be awarded by competitive bidding. Millin Publications, a publisher of specialized information services, intends to file PCS applications to provide service in a manner akin to the broadcast industry, *i.e.,* without subscribers. Millin's PCS network would allow purchasers of goods to pay for their items electronically using hand-held personal digital assistants free of charge except for the cost of hardware. Compensation would be paid by the vendor. It argues that, given that PCS does not yet exist and the very flexible regulations proposed for the service, the Commission should not find that PCS is reasonably likely to be a primarily subscription service technology.

56. We disagree. An overwhelming number of the commenters either actively support or implicitly assume that the principal use of licensed PCS spectrum is likely to be for the provision of service to subscribers for compensation.[48] Our own experience confirms this: of the scores of experimental PCS applications that the Commission has granted, a clear majority have proposed some variation of a charge on subscribers, whether for airtime or for the lease of subscriber equipment or both. Many of these licensees have submitted market studies on the effect of various pricing schemes on consumer demand.[49] In view of this evidence, we believe that the principal use of narrowband and broadband PCS licenses is "reasonably likely to involve the licensee receiving compensation from subscribers."[50] And, even assuming that some PCS licensees may ultimately not provide a subscriber-based service to their customers, the Commission must look to the likely principal use of spectrum in narrowband and broadband PCS when determining whether competitive bidding is applicable.[51]

57. We also confirm that the use of competitive bidding will speed the development and rapid deployment of PCS service to the public, including those residing in rural areas, with minimal administrative or judicial delays, as required by Section 309(j)(3)(A). Because we have confirmed that PCS would operate in the manner contemplated by Section 309(j)(2)(A), new Section 309(i)(1)(B) does not permit the Commission to utilize lotteries to choose from among mutually exclusive PCS applicants, leaving comparative hearings as our sole alternative. As we stated in the NPRM, our experience with the comparative hearing process has been less than satisfactory in terms of both administrative and judicial delay: competitive bidding should avoid this time consuming litigation.[52] Likewise, in contrast with comparative hearings, auctions will promote the objectives of Section 309(j)(3)(C) by recovering for the public a portion of the value of the spectrum made available for commercial use. We have also promulgated general rules, applicable to PCS, which are designed to avoid unjust enrichment as well as rules to ensure the opportunity for participation in auctions by the entities designated by Congress.

58. Finally, in accordance with subsection (j)(3)(D), we believe competitive bidding will promote efficient and intensive use of the spectrum in the case of PCS. We have defined PCS broadly as composed of a "wide array of mobile, portable and ancillary communications services to individuals and businesses," *Narrowband PCS Order,* ET Docket No. 92-100 and GEN Docket No. 90-314, FCC 93-329 (released July 23, 1993) at ¶ ¶ 13-14. Auctions are therefore likely to reinforce the desire of licensees to make efficient and intensive use of PCS spectrum. Auctions make explicit what others are willing to pay to use the spectrum, and the licensees' need to recoup the out-of-pocket expenditure for a license should provide additional motivation to get the most value out of the spectrum.

3. Common Carrier and Commercial Mobile Radio Services

59. Common carriers have subscribers; by definition, their services are offered indifferently to the public for hire[53] and therefore satisfy the requirements of Section 309(j)(2)(A). The new CMRS providers, who are treated as common carriers under Section 332(c), also have subscribers and thus also satisfy 5Section 309(j)(2)(A).[54] We proposed that spectrum-based common carrier services and commercial mobile radio services should be subject to auction if they met the other criteria for competitive bidding. *See* NPRM at ¶ 26. We discuss below specific common carrier and commercial mobile radio services that will be subject to competitive bidding.

60. *Public Mobile Services.* The Public Mobile Services are regulated under Part 22 of the Commission's Rules and include the Public Land Mobile Service (Subpart G), the Rural Radio Service (Subpart H), the Domestic Public Cellular Radio Telecommunications Service (Subpart K), the Offshore Radio Telecommunications Service (Subpart

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[48] *See, e.g.,* comments of UTC.M

[49] *See, e.g.,* Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Report and Order in GEN Docket No. 90-314, et al., FCC 93-550, released February 3, 1994.

[50] We anticipate that this would be the case with both "wideband" and "narrowband" PCS services. Our analysis, of course, does not apply to unlicensed PCS.

[51] For purposes of this discussion, we need not resolve whether the service described by Millin is, in fact, a non-subscription service within the meaning of Section 309(j)(2).

[52] *See, e.g.,* Kwerel and Felker, "Using Auctions to Select FCC Licensees," OPP Working Paper Series No. 16, May 1985. In our experience, most comparative hearings for licenses in rural areas do not proceed appreciably faster than comparative hearings for licenses in most urban areas.

[53] Section 3(h), Communications Act, 47 U.S.C. § 153(h).

[54] A commercial mobile radio service is a "for-profit" service and is treated as common carriage under Title II of the Act, 47 U.S.C. §§ 332(c)(1)(A) and (d)(1). The Commission has adopted rules governing the regulatory treatment of commercial mobile radio services. *See* Section 332 Second Report and Order, *supra.*

L) and the 800 MHz Air-Ground Radiotelephone Service (Subpart M). In the NPRM, we asked whether each of these services should be subject to competitive bidding. The comments we received with respect to these services focussed almost exclusively on two issues: the applicability of competitive bidding to certain cellular radio applications pending with the Commission on July 26, 1993,[55] and the applicability of competitive bidding to the Basic Exchange Telecommunications Radio Service (BETRS) and the Rural Radio Service.[56]

61. Outside of the two issues mentioned above or where the statute was unclear,[57] no commenter seriously disputed the applicability of auctions to mutually exclusive initial applications in the Public Mobile Services. Neither did any commenter seriously dispute our tentative finding in ¶ 147 of the NPRM that competitive bidding would promote the objectives of Section 309(j). Unless specifically excluded,[58] such applications will be subject to competitive bidding.

62. *Multipoint Distribution Service (MDS) and the Multichannel Multipoint Distribution Service (MMDS).* In the NPRM, we specifically proposed that future mutually exclusive MDS and MMDS initial applications be subject to competitive bidding, believing that doing so would promote the objectives of Section 309(j).[59] Although we do not address in this Second Report and Order the applicability of competitive bidding to MDS and MMDS applications which were filed prior to July 26, 1993,[60] we believe that new initial applications for these common carrier services are otherwise eligible for competitive bidding. Very few comments were filed on this subject, but those that addressed it did not oppose competitive bidding. *See, e.g.*, comments of Wireless Cable Association International. No commenter seriously disputed the applicability of competitive bidding to mutually exclusive initial applications in the MDS and MMDS or our tentative finding in ¶ 147 of the NPRM that competitive bidding would promote the objectives of Section 309(j). Therefore, at such time as the Commission accepts additional initial applications for MDS and MMDS licenses, we will resolve any mutual exclusivity between these channels by using competitive bidding. Because it is unclear when the existing freeze on new applications will be lifted, however, we defer promulgation of specific rules until that time.

63. *SMR and Exclusive PCP Services.* If multiple SMR initial applicants file for the same channels in the same location on the same day and if the Commission's existing procedures do not avoid mutual exclusivity, or if two or more PCP systems in the future file mutually exclusive initial applications, we intend to use competitive bidding to select from among competing applications.[61] Our rules explicitly contemplate and expect that these licensees will provide service to eligible subscribers for compensation.[62] We know from experience that this is the principal use of SMR and exclusive PCP spectrum, and the comments support our determination. *See, e.g.*, comments of GTE and McCaw.

64. We also believe that the use of competitive bidding will speed the development and rapid deployment of SMR service, including those residing in rural areas, with minimal administrative or judicial delays as required by Section 309(j)(3)(A). Because we have confirmed that SMR providers operate in the manner contemplated by Section 309(j)(2)(A), new section 309(i)(1)(B) does not permit the Commission to utilize lotteries to choose from among mutually exclusive initial SMR applicants, leaving comparative hearings as our sole alternative to resolve such mutual exclusivity. Such hearings are likely to be lengthy, contentious, and complex. Given this prospect, we believe that competitive bidding is likely to be a faster means of delivering service to the public. With respect to promoting the objectives of Section 309(j)(3)(C), we also believe that competitive bidding will recover for the public a portion of

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[55] *See, e.g.*, comments of John G. Andrikopoulos, *et al.*, Abby Dilley, various partners in The Quick Call Group, John Dudinsky, Jr., M. Kathleen O' Connor, and James F. Stern. As noted, we will address the applicablility of competitive bidding to certain cellular radio applications filed prior to July 26, 1993, in a separate order. These applications present unique issues because of the special rule that Congress adopted in Section 6002(e) of the Budget Act that is applicable only to mutually exclusive applications filed prior to that date. The status of the applications at issue in *McElroy Electronics v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993), will likewise be decided at that time since they present similar issues.

[56] *See, e.g.*, comments of Interdigital. The applicability of competitive bidding to the BETRS and the Rural Radio Service is discussed in subsection F, *supra*.

[57] *See, e.g.*, comments and reply comments of AllCity Paging.

[58] *See, e.g.*, the discussion at ¶ ¶ 45-46 excluding the BETRS from competitive bidding on grounds that auctioning licenses in these services would not further the objectives in Section 309(j)(3). In some cases, Public Mobile Service licenses are available to end users as well as common carriers. *See, e.g.*, Section 22.100 (Offshore Radio Service may be licensed to end users) and Section 22.600 (Rural subscriber stations may be licensed to individual users of the service). We defer resolution of the issue of mutually exclusive applications between common carriers and end users to a later date inasmuch as mutual exclusivity in these classes of services is extremely rare; should it occur, we will decide the appropriate course at that time. The 800 MHz air-ground radiotelephone service (although not the 450 MHz air-ground radiotelephone service, which has exclusive frequencies) will be excluded from competitive bidding because those frequencies are shared. *See* Section 22.31(h) of our Rules.

[59] *See* NPRM at ¶ ¶ 147-151. No MDS or MMDS applications are currently being accepted, due to a freeze which the Commission has placed on the filing of such applications. *See* Public Notice, "MDS/MMDS Applications Filing Freeze," released July 28, 1993.

[60] *See, e.g.*, comments of MW TV. We will address this issue in a separate order.

[61] In light of our past experiences with the release of new SMR spectrum, we believe that mutual exclusivity is highly likely if we were to release new SMR spectrum at the conclusion of PR Docket Nos. 93-144 and 89-553, the 800 MHz and 900 MHz SMR proceedings. *See* PR Docket No. 93-144, 8 FCC Rcd 3950 (1993); PR Docket No. 89-553, 8 FCC Rcd 1469 (1993). Due to the uncertainty over the outcome of these proceedings, however, we decline to confirm, as requested by AMTA and Cencall, that the licenses which may be issued as a result of those proceedings will not be the result of "initial" applications. *See* ¶ 66, *infra*. If at the conclusion of those proceedings we decide that 800 or 900 MHz SMR applications may fairly be characterized as modification applications, then we will not subject them to competitive bidding. AMTA's argument that the Congressional objective of effective and intensive use of the spectrum is unlikely to be satisfied if the Commission employs auctions to award 900 MHz licenses outside the Designated Filing Areas (the largest 50 markets in the U.S.) is speculative.

[62] *See* NPRM at ¶ 136 and n.129; PCP Exclusivity Report and Order, *supra*.

the value of SMR and exclusive PCP spectrum made available for commercial use and avoid unjust enrichment for the same reasons explained in conjunction with PCS service.

65. In the NPRM, we requested specific comments on how we should treat mutually exclusive finder's preferences which are currently governed by Section 90.611(d) of our Rules. Under that rule, members of the public may submit to the Commission information that results in the takeback of SMR and other categories of channels. Above, we have determined generally that frequencies allocated to the SMR service should, in the event of mutual exclusivity, be awarded pursuant to competitive bidding. We see no reason to treat mutually exclusive finder's preference requests for SMR frequencies differently from mutually exclusive applications for SMR frequencies. Therefore, we hold that in such event, the licenses should be awarded pursuant to competitive bidding. *Accord,* reply comments of Southwestern Bell. Conversely, if mutually exclusive finder's preference requests target General Category or non-SMR frequencies, they would not be subject to competitive bidding.

66. Although we believe that SMR services should be subject to competitive bidding, we note that we currently have before us proceedings that propose significant changes to our current 800 and 900 MHz SMR licensing policies. To attempt to promulgate competitive bidding rules governing mutually exclusive SMR licensing in the face of these licensing uncertainties is likely to be difficult, if not impossible.[63] As we move closer to resolving these issues, however, we intend to promulgate rules detailing how competitive bidding would apply in these services.

67. Although we conclude that mutually exclusive 900 MHz PCP applications should be subject to competitive bidding, we recognize that exclusivity in the 900 MHz PCP service is a very recent phenomenon and it is not clear whether or how frequently mutual exclusivity will arise where first-come, first-served licensing is ongoing. In addition, we believe that alternative measures, such as frequency coordination and private settlement among conflicting applicants, can resolve most, and perhaps all, potential conflicts among PCP applicants. *See* Section 309(j)(6)(E). Because these efforts may obviate the need for competitive bidding, we leave the promulgation of specific auction rules for this class of service to a time when we can be reasonably certain that they will be needed.

III. COMPETITIVE BIDDING DESIGN

A. Introduction

68. In this section, we adopt simultaneous multiple round auctions as our primary auction methodology. We believe that, for most licenses that the Commission intends to auction, this method will best meet the Congressional goals that we set forth in Section I. However, our analysis of the record in this proceeding has convinced us that there is no single competitive bidding design that is optimal for all auctionable services. Moreover, Congress has directed us to "design and test multiple alternative methodologies under appropriate circumstances." *See* Section 309(j)(3). For these reasons, we shall not adopt a single auction design herein. Instead, we will identify a number of auction design options, indicating in general terms the service characteristics for which each option is appropriate. We will issue further Reports and Orders in this docket to adopt auction rules for each auctionable service or class of service. When we announce individual auctions to award licenses in specific services, a Public Notice will include detailed auction procedures. The choice of service specific rules and auction procedures will be governed by the criteria set forth in this Report and Order.

69. This section will discuss the impact of bidding design on our policy objectives, discuss the choice of design criteria to meet those objectives with respect to varying service characteristics, and examine several important bidding procedure issues. As discussed in more detail in subsection B, we have concluded generally that awarding licenses to those parties that value them most highly will foster our policy objectives. Subsection C elaborates on our conclusions regarding auction design: (1) licenses with strong value interdependencies should be auctioned simultaneously; (2) multiple round auctions, by providing bidders with information regarding other bidders' valuations of licenses, yield higher revenues and more efficient allocations of licenses, especially where there is substantial uncertainty as to value; and (3) because they are relatively expensive to implement and time-consuming, simultaneous and/or multiple round auctions become less cost-effective as the value of licenses decreases. Subsection D contains our discussion of preferred auction designs, and subsection E discusses various bidding procedure issues.

B. Effect of Design on Policy Objectives

70. *Awarding Licenses to the Parties that Value Them Most Highly.* Our auction design choices are calculated to advance the goals set forth in Section I. Analysis of the record in this proceeding leads us to confirm our tentative view, advanced at ¶ 34 of the Notice, that auction designs that award licenses to the parties that value them most highly will best achieve those goals.[64] Those parties are most likely to deploy new technologies and services rapidly, promote the development of competition for the provision of those and other services (including, but not limited to cellular, SMR, paging, and other wireless services), and thus foster economic growth. We note that this conclusion is subject to the provison that certain safeguards to prevent undue market concentration, spectrum warehousing, and to promote economic opportunity may be needed. In general, however, the market value assigned

[63] In PR Docket No. 93-144, for example, we propose a two-step method of licensing proposed wide-area 800 MHz SMRs: in the first step, applicants would negotiate in the hopes of avoiding mutual exclusivity; if they are unable to do so, we propose having lotteries or competitive bidding to resolve the remaining instances of mutual exclusivity. Cencall proposes that if the Commission does auction SMR frequencies that will be licensed as a result of PR Docket Nos. 89-553 and 93-144, the Commission should auction those frequencies one by one and only for individual contested frequencies associated with mutually exclusive applications. *See* comments of Cencall. This is but one example of the complexities that we would face were we to attempt to promulgate service-specific auction rules for SMRs at this time.

[64] To the extent that the initial auction does not award licenses to those who value them most highly, after-market transactions will perform this function to some degree, but not without delays and additional transaction costs.

to licenses via the auction process can be expected to reflect the benefits to both consumers and producers, now and in the future.

71. The conclusion that licenses generally should be awarded to those who value them most highly received substantial support in the comments, particularly by the academic commenters. As stated by Professor Milgrom:

> Since a bidder's abilities to introduce valuable new services and to deploy them quickly, intensively, and efficiently increase the value of a license to a bidder, an auction design that awards licenses to those bidders with the highest willingness to pay tends to promote the development and rapid deployment of new services in each area and the efficient and intensive use of the spectrum.[65]

72. The Association for Independent Designated Entities (AIDE), however, disagrees with our presumption that licenses should be awarded to those who value them most highly.[66] It also argues that the Commission cannot lawfully design its competitive bidding system to maximize auction revenue, citing §§ 309(j)(7)(A) and (B) of the Act, but should base its decisions in this proceeding upon traditional public interest factors and the specific statutory objectives of competitive bidding. Likewise, PageMart argues that Congress has affirmatively directed the Commission to encourage a diverse and competitive marketplace even if the so-called allocative efficiency of the market is "somewhat" disturbed as a result.[67] PageMart further argues that auction schemes that focus on efficiency alone must be rejected.

73. We disagree with AIDE's implicit assumption that our purpose is to maximize auction revenue. While Congress has charged us to recover a portion of the value of the public spectrum made available via competitive bidding, this does not amount to maximizing revenue, nor is it our sole objective. To the contrary, our goals are to encourage the rapid deployment of service, efficient use of the spectrum, and the other goals enumerated in Section I. Pursuing these objectives is in full accordance with the statutory purpose of auctions as set forth in § 309(j)(3). And, we have concluded, based on our analysis of the record, that we can best achieve these objectives by generally awarding licenses to the parties that value them most highly. Moreover, this approach is permitted by § 309(j)(7)(C), which provides that §§ 309(j)(7)(A) and (B) do not prevent the Commission from considering "consumer demand," such as by assigning licenses to those who would provide services most highly valued by the public.

74. In addition, contrary to PageMart's contention, the development of a diverse and competitive marketplace is only one of the several goals that the Congress required the Commission to consider in designing systems of competitive bidding. That objective must be balanced with other objectives of the Act, such as § 309(j)(3)(D)'s requirement that we promote efficient and intensive use of the spectrum.

75. While we believe that the overall presumption should be that those who are willing to pay the most for a spectrum license should receive it, we have established an extensive menu of programs to ensure that the entities designated by Congress have an equitable opportunity to participate in the competitive bidding process. Because of concerns over competition, we havealso created safeguards to prevent undue market concentration, such as placing limits on the amount of broadband PCS spectrum that cellular carriers may acquire and similarly limiting the amount of narrowband PCS spectrum that a single entity can acquire.[68] Given these and other steps we have taken, we cannot agree with the proposition that our proposed auction designs promote efficiency to the exclusion or subordination of all other goals.

76. *Facilitating Efficient Aggregation.* In designing auctions to best meet all our goals, we must take into account the value interdependency among many of the licenses that we propose to auction. As discussed in more detail below, when licenses are highly value-interdependent, *i.e.*, when the value of a license to a bidder depends on the other licenses that the bidder acquires, it is particularly important that we implement auction designs that facilitate efficient (but not anticompetitive) aggregation of such licenses.

77. *Awarding Licenses Rapidly.* It is also important to award licenses to the appropriate parties rapidly, since the sooner the licenses are awarded to the parties that value them most, the sooner new service is likely to be available, and the sooner consumers will benefit from competition among new suppliers and between new suppliers and incumbent firms. We therefore seek to employ bidding procedures that can be implemented efficiently and within a reasonable time period.

78. *Avoiding Excessive Implementation Costs and Complexity.* Finally, in selecting auction methods the Commission must take into account the costs of implementation both for the Commission and potential bidders. We therefore intend to select bidding procedures that are not overly complex relative to the task that they are meant to accomplish and which ensure that the full range of qualied bidders have access to the process.

C. Alternative Competitive Bidding Designs

79. There are several auction design elements which, in combination, produce many different auction types. The two most important design elements are: 1) the number of auction rounds (single or multiple); and 2) the order in which licenses are auctioned (sequentially or simultaneous-

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[65] Comments of PacBell, Attachment by Paul R. Milgrom and Robert B. Wilson at 7. Professors Harris and Katz agree: "Because its overall supply is limited, it is important to allocate spectrum to those license holders who will use it to generate the greatest social benefits. The overall presumption should be that those who are willing to pay the most for the spectrum are the ones who will put it to the most valuable use." Harris and Katz concur with us that safeguards against undue market power and measures to ensure appropriate participation of designated entities may be needed. *See* comments of NYNEX, Attachment by Robert G. Harris and Michael L. Katz: "A Public Interest Assessment of Spectrum Auctions for Wireless Telecommunications Services" at 1-2.

[66] Comments of AIDE at 4-5.

[67] Reply comments of PageMart at 4.

[68] *See, e.g.*, Second Report and Order in GEN Docket No. 90-314, 8 FCC Rcd 7700 (1993), *recon. pending;* First Report and Order in GEN Docket No. 90-314, 8 FCC Rcd 7162 (1993), *recon.* FCC No. 94-30, released March 4, 1994.

ly). These two elements can be combined to create four basic auction designs: sequential single round, simultaneous single round, sequential multiple round, and simultaneous multiple round. A third element of auction design is whether to permit all or nothing bids for combinations of licenses, *i.e.*, combinatorial bidding. Before addressing which of these auction designs will be our preferred design, it is useful to discuss the basic design elements and describe their advantages and disadvantages.

1. Multiple v. Single Round Bidding

80. Auctions may have either a single round or multiple rounds. Single round auctions are often referred to as sealed bid auctions (*see* NPRM at ¶ 40). In a single round auction, a single bid is submitted and the license awarded to the high bidder. In multiple round auctions, bidders have the opportunity to top the high bids from the previous round. Typically such auctions end when no bidders are willing to top the bids from the previous round. A common form of a multiple round auction is the oral auction, also known as an open outcry or English auction (*see* NPRM at ¶ 37) in which bids are submitted orally in an auction hall.[69]

81. *Alternative Multiple Round Bidding Designs.* Multiple round auctions may differ in both the interval between bidding rounds and the method of bid submission. In a traditional open outcry auction, bids are made continuously, one after another, and items often sell within minutes. In other multiple round auctions, there are discrete intervals between the periods during which bids are submitted.[70] With discrete rounds, the Commission can control the pace at which the auction proceeds. The method of bid submission depends in part on whether the auction rounds are continuous or discrete. In continuous auctions, bids may be submitted orally, by telephone, or computer. Telephone bidding is currently used for auctioning financial instruments and the current high bids for these assets are made available to bidders on specially designed computer bulletin boards. If there are discrete bidding rounds bids could also be submitted on paper or computer disks.

82. *Advantages of Multiple Round Bidding.* The principal advantage of a multiple round auction is the information that it provides bidders regarding the value other bidders place on licenses. This information increases the likelihood that licenses are assigned to bidders that value them most highly and will generally yield more revenue in auctions where there is much uncertainty about common factors that affect the value of a license to all bidders (common value auctions).[71] In a single round auction, bidders must guess about the value that other bidders place on a license in trying to submit a single bid that just exceeds the next highest bid. Thus the party who values the license most highly may not submit the highest bid. In a multiple round auction, bidders need not guess about the value the second highest bidder places on the license because bidders have the opportunity to raise their bids if they are willing to pay more than the current high bidder. Multiple round bidding is also more likely than single round bidding to be perceived as open and fair. No bidder can argue that it did not have the opportunity to obtain a license if it was willing to pay enough.

83. Auction theory shows that multiple round bidding tends to increase revenue in common value auctions by reducing the incentive of bidders to shade down bids to avoid the winner's curse -- the tendency for the winner to be the bidder who most overestimates the value of the item for sale.[72] Common value aspects of spectrum licenses arise from common technological possibilities, common demand for the services, and the presence of a common aftermarket. Multiple round bidding provides information about other bidders' estimates of common values, allowing all bidders to improve their estimates of these common values. With better information, sophisticated bidders will have less incentive to bid cautiously so as to avoid falling victim to the winner's curse.

84. Several commenters stress the importance of providing bidders with information in common value auctions via multiple round bidding.[73] For example, Professor McAfee states that "ascending bid auctions tend to produce more efficient outcomes and higher average prices" than first-price, single round sealed bid auctions, and, after noting sources of bidder uncertainty about the value of PCS licenses, asserts that "the auction should be designed to provide bidders with as much information as possible, which means providing information about other bidders' estimates of the licenses' value in the process of running the auction."[74] Multiple round bidding will maximize the provision of such information.

85. *Advantages of Single Round Bidding.* On the other hand, multiple round bidding does involve some increased administrative cost. Therefore, a single round (*i.e.*, sealed bid) procedure may be an appropriate option for relatively low value licenses in which the costs of implementing a multiple round auction may outweigh the benefits. A sin-

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[69] Many commenters favored the use of oral auctions exclusively. *See, e.g.*, comments of McCaw, Quentin L. Breen, and U.S. Intelco Networks. Commenters favoring this method praise its openness, ease of administration, familiarity, and high degree of information dissemination. *See also* comments of BellSouth. Professor R. Mark Isaac, commenting on behalf of CTIA, asserted that auction theory predicts that oral sequential auctions for single units will be efficient, approximately demand revealing, and generate the same revenue as the other methods.

[70] An example of such a procedure is the recently completed bidding for control of Paramount Communications, which was conducted in intervals over a five month period.

[71] In a pure common value auction, the item up for auction has the same value to everyone, but bidders' valuations at the time of the auction differ because they have different estimates of that underlying true value.

[72] John McMillan, *Games, Strategies and Managers*, (New York: Oxford University Press), at 142-143. When bidders are risk averse there is another effect on revenue opposite to that of the winner's curse -- risk aversion tends to raise bids more in single round bidding than multiple round bidding. John Riley and William Samuelson, "Optimal Auctions," *American Economic Review*, Vol. 71, No. 3 (June 1981)

[73] Only when there are common value elements can bidders improve estimates of their own value of an item based on observing bids of others on that item.

[74] Comments of PacTel Attachment by R. Preston McAfee: "Auction Design for Personal Communications Services" at 4-5. *See also* comments of Bell Atlantic, Attachment by Barry J. Nalebuff and Jeremy I. Bulow: "Designing the PCS Auction" at 12; 20-21, and comments of NYNEX, Attachment by Robert G. Harris and Michael L. Katz at 7-9. For a more detailed discussion of common value models, *see* comments of NTIA, staff paper by Mark Bykowsky and Robert Cull: "Issues in Implementing a Personal Communications Services Auction" at 20-28.

gle round of bidding may also be appropriate in certain auctions where eligibility requirements limit participation to very few bidders.[75] With a small number of bidders, bidding cartels are easier to organize and may reduce auction revenue below fair market value (although not necessarily result in any efficiency loss). Using a single sealed bid could reduce the likelihood of such collusive behavior since it provides colluding bidders a greater incentive to defect. With a single sealed bid, retaliation must come in later auctions, if any, while with multiple round bidding, retaliation against a cartel defector can come immediately. In opting for single round over multiple round bidding, the Commission must weigh the benefits of deterring collusion and lower administrative expenses against the costs of a lower likelihood of awarding licenses to the bidders who value them most highly and the loss in revenue associated with a stronger winner's curse.

2. Sequential v. Simultaneous Bidding

86. Licenses may be auctioned either sequentially or simultaneously. In a pure sequential auction, licenses are auctioned one at a time. That is, bidding ends on one item before bids are accepted for another item, as is typically the case in an open outcry auction. In a pure simultaneous auction, all licenses are put up for auction at the same time. That is, bidding is open on all licenses at once until no more bids are received on any license. There are intermediate designs between pure sequential and pure simultaneous auctions. Related licenses may be placed into groups and all licenses within the group auctioned simultaneously, but the groups can be auctioned one after another, *i.e.*, sequentially. In this case, a choice must be made as to how to group licenses and the sequence in which groups will be auctioned.

87. *Simultaneous Bidding for Homogeneous Licenses.* An important special type of simultaneous bidding, which we will refer to as a single combined auction (which could incorporate either one or multiple rounds of bidding),[76] may be useful when auctioning multiple homogeneous licenses.[77] Under this approach, the Commission would combine bidding for two or more homogeneous licenses.[78] Licenses would be awarded to the highest bidders until the available licenses are exhausted, *e.g.*, four virtually identical licenses would be awarded to the four highest bids. Single combined auctions could also be used for licenses that are close, but not perfect, substitutes. Small differences among licenses could be accounted for by allowing winning bidders to choose among the licenses in descending order of their bids, *i.e.*, the party with the highest winning bid would pick first. Single combined auctions are used by the U.S. Department of the Treasury to sell (perfectly homogeneous) U.S. securities (*see* NPRM at ¶ 43). In such Treasury auctions the sales price is generally the bid price. However, Treasury has recently experimented with single-price auctions in which all successful bidders pay the same price -- the highest losing bid.

88. *Comments.* Many of the comments and papers written by academic auction theorists strongly favored the use of simultaneous multiple round bidding.[79] Those favoring simultaneous multiple round bidding argue that it permits bidders to receive greater information during the bidding process and allows bidders back up strategies that take account of the value of interdependencies among licenses. Other academic papers, however, while incorporating a certain degree of simultaneity in their auction design, favored greater reliance on sequential bidding.[80]

89. *Advantages of Simultaneous Multiple Round Bidding.* Simultaneous multiple round bidding has a number of important advantages over sequential auctions for awarding interdependent licenses. First, they are more likely to award interdependent licenses efficiently -- to those who value them the most and aggregated in the way that is most valuable. This increased efficiency derives from the information about the value of interdependent licenses provided to bidders during the bidding process and the opportunity to use that information because all such licenses are available until the close of the auction. Second, simultaneous multiple round auctions are likely to raise more revenue than sequential auctions because they mitigate the effect of the winner's curse. Third, they avoid the need to choose the sequence of bidding.[81]

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[75] A minority of commenters strongly support sealed single round bidding. They argue that it is less subject to manipulation than oral bidding and is easier to implement than oral bidding. *See* comments of Richard S. Myers. Others support using sealed bids only in limited circumstances, as when there are only two or three bidders. *See* comments of AT&T, Cellular Communications, Inc. and Calcell Wireless.

[76] This is a special case of a simultaneous auction because bids are accepted on multiple (identical) items at the same time.

[77] Two or more licenses are perfectly homogeneous if they are perfect substitutes, *i.e.*, if bidders are indifferent about which one they acquire. Licenses in the same spectrum band, with the same amount of spectrum, and in the same geographic license area may, however, not be perfectly homogeneous for two reasons. First, there may be differences in the amount and location (geographic and frequency) of spectrum occupied by incumbent users, as in the case of broadband PCS licenses. Second, a bidder seeking to operate in more than one license area may prefer that all the spectrum be on the same channel. Acquiring spectrum on the same channel tends to simplify coordination of interference at boundaries, thus lowering the cost of providing service.

[78] This approach was proposed by Bell Atlantic, see comments of Bell Atlantic Personal Communications Inc., Attachment by Barry Nalebuff and Jeremy Bulow at 4-5. It can be used in conjunction with any auction type.

[79] *See* comments of PacTel, Attachment by R. Preston McAfee; comments of PacBell, Attachment by Paul R. Milgrom and Robert B. Wilson; and comments of NYNEX, Attachment by Robert G. Harris and Michael L. Katz.

[80] *See* comments of Bell Atlantic, Attachment by Professors Barry Nalebuff and Jeremy Bulow; and comments of TDS, Attachment by Professor Robert J. Weber: "A Proposed Auction Methodology for PCS Licenses." Some of the academicians modified their original proposals in response to the comments of others. *See* reply comments of Bell Atlantic and of PacBell.

[81] The analysis of simultaneous single round bidding for interdependent licenses is very different from that of simultaneous multiple round bidding. Although a single round of sealed bids for all licenses would be fast and administratively simple, it is the least likely method to achieve our other auction objectives for two reasons. First, such an auction generates no information about license values until after the auction closes, when the information cannot be used by bidders. This factor tends to decrease bid levels and to reduce the efficiency of the license assignment. Second, the method provides bidders no opportunity to pursue back-up strategies, except in the after-market, where transactions costs may be high.

90. The magnitude of the advantages of simultaneous multiple round bidding depends on the degree of interdependence among licenses. Licenses may be interdependent either because they are substitutes or because they are complements. With substitutes, the lower the price of one license, the less a bidder would be willing to pay for another. Perfect substitutes are highly interdependent because the price of one puts an absolute cap on the amount a bidder is willing to pay for the other. If, for example, licenses A and B are perfect substitutes and a bidder knew that license A could be purchased for $100, that bidder would be willing to pay no more than $100 for license B.

91. With complementary licenses, on the other hand, the lower the price of one, the more a bidder would be willing to pay for another. One way to think about complementary licenses is that they are worth more as part of a package than individually. For example, bidders are likely to be willing to pay more for two geographically contiguous PCS licenses than two equivalent non-contiguous licenses, and a single bidder may be willing to pay more for two licenses than would two separate bidders. Commenters have identified several sources of such interdependence among PCS licenses. First, common ownership of licenses in adjacent areas facilitates roaming by users. Professor Daniel Vincent argued that consumer demand for a service that will allow them to use their handset across regions is the main source of interdependence.[82] NTIA agreed, noting that the value of roaming has already been clearly demonstrated in the cellular industry.[83] Second, ownership of multiple licenses both across geographic areas and within a given area provides economies of scale arising largely from spreading of fixed costs over more units of output.[84] Marketing, system engineering, switching and standard setting are examples of activities with important elements of such fixed costs. Third, common ownership of geographically adjacent licenses on the same spectrum block reduces problems of controlling interference at license boundaries.[85] There may be additional economies of scope from common ownership of contiguous licenses, whether or not they are on the same spectrum block.

92. The greater efficiency of simultaneous multiple round auctions in awarding interdependent licenses follows in part from the fact that they reduce the need for bidders to guess about outcomes in later auction rounds. With sequential auctions bidders in initial rounds must guess about prices in later rounds. A bidder may pay too much for a license in an early round on the mistaken expectation of a low price for a complementary license (or a high price for a substitute license) in a later round. Alternatively, a bidder may bid too little for a license in an early round in the hope that a close substitute will sell for less in a later round. Either situation could result in award of licenses to those who do not value them the most, but we will illustrate the potential for inefficiency only for the latter case. Suppose that there are two licenses that are close substitutes, for example the A and B PCS licenses in the same region. If the two parties that value these licenses most highly hold back on bidding when the first license is offered in a sequential auction, the first license would be awarded to the bidder with the third highest valuation. In contrast, with simultaneous auctions, the two bidders with the highest valuations would generally win the two licenses. A simultaneous auction also allows bidders to pursue backup strategies. With sequential auctions, a bidder may learn too late that, given the licenses it has won and those it failed to win, it is now willing to pay more than the high bids for licenses that were awarded in earlier rounds.

93. By providing more information to bidders about the value of interdependent licenses, simultaneous auctions are also likely to raise more revenues by alleviating the winner's curse. With sequential auctions bidders are likely to be especially cautious in their bidding on initial licenses. If the largest PCS regions were to be put up for bid first in a sequential auction, the revenue loss could be significant.

94. Finally, simultaneous auctions reduce the need to choose the sequence in which licenses within a service are auctioned. With pure simultaneous auctions, no choice of sequence would be necessary since all available licenses within a service would be auctioned at the same time. In the case of a sequence of simultaneous auctions, the Commission would need to choose which licenses to auction together and the sequence in which such groups would be auctioned. Within each group, however, no choice of auction order would be necessary. In contrast, with a pure sequential auction, the Commission must decide on the order in which to auction every individual license. Different bidders are likely to want licenses auctioned in different sequences to favor their particular business plans, and there is no agreement among the commenters on the appropriate sequence.

95. *Disadvantages of Simultaneous Multiple Round Bidding.* On the other hand, simultaneous multiple round auctions may have some disadvantages. First, as recognized in the Notice, such auctions have only limited precedent for use and could be more difficult to implement. Second, they may appear more complex to bidders because of the number of licenses that must be monitored during the bidding process. Third, a bidder interested in only one or a few licenses would need to participate over a longer period of time in a simultaneous auction than in sequential auctions. Fourth, with all licenses being auctioned simultaneously, bidders cannot be absolutely certain which licenses they have won until the end of the auction. In sequential auctions bidders know which licenses they have won in early rounds before having to bid in later rounds.

96. These difficulties are emphasized by those academic commenters who favor primary use of sequential bidding.[86] With regard to the problem of added complexity, Nalebuff and Bulow, for example, argue that simultaneous auctions

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[82] *Ex parte* presentation, February 17, 1994 at 2.

[83] Comments of NTIA, Bykowsky-Cull staff paper at 15-16.

[84] *See ex parte* comments of Professor Paul R. Milgrom, February 14, 1994, at 9. Many of the academic commenters specifically mentioned the potential benefit of aggregating licenses within a given geographic area. *See, e.g.,* commnets of NTIA, Bykowsky-Cull staff paper at 16.

[85] *See ex parte* comments of Professor Paul R. Milgrom, February 14, 1994, at 9.

[86] Even the academics who general favor sequential auctions advocate incorporating a limited degree of simultaneity into their preferred auction designs. For example, Nalebuff and Bulow would "allow some simultaneity into the process by combining the bidding across the two 30 MHz licenses within an MTA, the three 10 MHz licenses within a BTA, and running the two designated license auctions simultaneous with the auction for the other three BTA license." Reply comments of Bell Atlantic, Attachment by Barry J. Nalebuff and Jeremy I. Bulow

present too many decisions to be made at once.[87] However, we believe that by providing adequate time for bidding, *e.g.*, one round per day, each bidder will have ample time to analyze their options for the subset of licenses in which it is interested. Indeed, for those bidders interested in only a few licenses, a simultaneous auction would have the advantage of providing far more time per license to make bidding decisions than in sequential auctions. Moreover, most of the time, a bidder in a simultaneous auction merely needs to make incremental decisions -- whether to raise its bids on the properties on which it is already bidding. Only occasionally might a bidder have to make a major decision -- whether to switch to a backup strategy and bid for a different group of licenses. Indeed, the strategic decisions in a simultaneous auction may be less complex than in sequential auctions, where a bidder must decide in early auctions how much it is willing to pay for a license without knowing what it will have to pay in later auctions for other licenses that are important to its aggregation strategy.

97. With regard to a bidder's lack of certainty about which licenses it has won until the end of a simultaneous auction, those advocating sequential auctions claim that the "quality" of information released by sequential auctions is higher because actual prices of licenses auctioned earlier are available to bidders in later auctions.[88] That is, advocates of sequential auctions appear to be claiming that only the final, equilibrium price of a license provides useful information about valuation. However, we have concluded that, with appropriate activity and stopping rules (*see* discussion *infra*), simultaneous auctions provide bidders with significant useful valuation data at a time when they can use it.[89] In contrast, bidders in the early sessions of a sequential auction have little or no information about prices of licenses to be auctioned later. In later auctions, while they do have good information about prices from the earlier auctions, they are unable to go back and change their bids in earlier auctions, based on what happens in later auctions.

3. Combinatorial Bidding

98. Combinatorial bid techniques permit bidding for multiple licenses as all or nothing packages. It could be implemented with either simultaneous or sequential auction designs. If a package bid were to exceed the sum of the highest bids for the licenses that comprise the package (individually or in smaller packages), then the package bid wins. The range of packages for which bids are permitted could be defined by the Commission (*e.g.*, all PCS licenses in band A) or bidders could be allowed to choose their own packages.[90] NTIA is the primary proponent allowing bids on any combination of licenses, *i.e.*, full combinatorial bidding.[91]

99. *Advantages of Combinatorial Bidding.* Combinatorial bidding may promote efficient aggregation of licenses that are worth more as a package than individually. It may also simplify bidding strategy since bidders can avoid the problem of determining how to allocate the added value of a package among individual bids. Without combinatorial bidding bidders risk paying too much for part of a desired package while losing the rest of the package to other bidders. The magnitude of this exposure depends on the specifics of the auction design and the value bidders put on various packages of licenses. This exposure is greater in a sequential auction than a simultaneous auction because bidders have less information about the likely prices of complementary licenses. It is also greater the more severe the consequences of bid withdrawal. Exposure risk is greatest when the value of a package is severely diminished by the absence of a single part. Finally, the risk of exposure is greater when bidders do not agree on how licenses should be combined. When bidders generally want the same packages of licenses, if a firm is outbid on part of a package it is likely to be outbid on the entire package, and thus not likely to be stuck holding a piece of a package that is of little value without the rest of the package.

100. There is also some limited experimental support for the use of combinatorial bidding. Laboratory experiments conducted at Caltech found that full combinatorial bidding as proposed by NTIA resulted in more efficient outcomes than any of the individual bidding alternatives tested including various sequential and simultaneous auction forms. The Caltech experiments also found that full combinatorial bidding also generally raised more revenue than the simultaneous independent auction form tested.[92]

101. *Disadvantages of Combinatorial Bidding.* On the other hand, a simultaneous auction design offers the possibility of efficient license aggregation without combinatorial bidding and combinatorial bidding appears to bias auction results in favor of the combination bid. This is due to the "free rider" problem. Bidders for individual licenses (or smaller packages) may be reluctant to raise

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at 26. Moreover, Nalebuff and Bulow note that "reasonable people could hold different opinions" regarding the utility of simultaneous auctions. *Id.* at 10-11.

[87] *Id.* at 11.6

[88] *See, e.g.*, reply comments of Bell Atlantic, Attachment by Nalebuff and Bulow at 13 ("Although there is a lot of information, it can still be hard to interpret. Until the auction is over, nothing has been determined.") *See also* Letter from Robert Weber to Professor John McMillan, Jan. 9, 1994 (Simultaneous auctions "bring relatively little meaningful information into the public domain until near the very end," whereas appropriately structured sequential auctions "will bring the most important information into the public domain early").

[89] *See ex parte* submission of Paul R. Milgrom, Feb. 14, 1994, at 12-14. *See also* reply comments of PacTel, Attachment by R. Preston McAfee at 1-2, 7-8.

[90] The NPRM proposed a nationwide combinatorial bid for broadband PCS licenses. *See* ¶ ¶ 57-60 and 120 of the NPRM. This proposal was criticized by commenters as inequitable as well as economically inefficient. *See, e.g.*, comments of NTIA, Bykowsky-Cell staff paper at 48-49 (combinatorial bidding limited to a single package would result in some PCS licenses being assigned to bidders that do not value them most highly); comment of PacBell, Attachment by Milgrom and Wilson at 8-13 (proposal would create free rider problems among bidders for individual licenses); comments of Arch Communications at 9 (FCC's proposal too complex).

[91] NTIA argues that where licenses exhibit high degrees of interdependency, full combinatorial simultaneous multiple round bidding is likely to produce more efficient license assignments and more revenues than other auction forms. *See* comments NTIA, Bykowsky-Cull staff paper, and Letter from Larry Irving, Assistant Secretary for Communications and Information, NTIA, to Reed Hundt, Chairman, Federal Communications Commission, *ex parte* submission in PP Docket No. 93-253, February 28, 1994.

[92] *Ex parte* submission of NTIA, February 28, 1994.

their own bids in order to beat a combinatorial bid for a larger package because they hope that other bidders for other parts of the larger package will raise their bids. Since all individual bidders can be expected to reason this way, it is likely to be difficult to put together a coalition of bidders to raise their bids enough to beat a combinatorial bid for a larger package.[93]

102. Combinatorial bidding would also add one more layer of complexity to implementing an auction. Implementation problems are especially difficult if parties are permitted to bid for any combination of licenses as proposed by NTIA. First, there are a huge number of such possible combinations. For example, Professor Weber calculated that if there were five licenses available in each of six geographic areas there would be over one billion possible packages of licenses.[94] Second, full combinatorial bidding would require computer software that has not yet been fully developed for use on a large scale and would risk computer or other administrative failure. Third, full combinatorial bidding is non-transparent, that is, it would be difficult for bidders to determine in advance what constitutes a high bid. This could lead losing bidders to challenge the procedure in court.

103. Limiting combinations to a small number would reduce complexity but require a determination of the most valuable packages prior to the auction. There is no simple way to make such a determination, and if there is a wide diversity of desired license groupings, offering only a limited set will not accommodate all preferences and may not enhance efficiency.

104. We also note that some of the conditions under which the advantages of combinatorial bidding are apt to be the greatest are not likely to be present for most FCC auctions. First, while certain licenses are likely to be worth more as part of packages, there is no evidence of an extreme discontinuity in value if one or more licenses in the package are not acquired. Certainly there is no reason to believe that the entire benefit of aggregation is lost if a single license is not included in the package. Second, both the existence of an after-market and the proposed bid withdrawal penalty (*see infra*) limit the risk associated with failing to acquire all the licenses in a desired package. Whether a bid is withdrawn or a license acquired and resold in the after-market, the cost is likely to be limited to about one bid increment.

105. Although the Caltech experiments suggest empirical advantages of full combinatorial bidding it is difficult to assess their significance. First, the results are sensitive to the assumptions about benefits of aggregation, and we can not know the extent to which these assumptions reflect reality until after the auctions. However, it appears that the experimenters generally assumed an unrealistically large premium from acquiring an entire package.[95] Second, the experiments were conducted on a small scale. The complexity of running and participating in a full combinatorial auction may be manageable with 10 bidders and 54 licenses, but it may not be with hundreds of licenses and bidders.

D. Preferred Competitive Bidding Designs

1. Primary Method: Simultaneous Multiple Round Bidding

106. After carefully considering all of the comments presented in this proceeding, we conclude that in most circumstances the best method to advance the goals for competitive bidding expressed in Section I, *supra*, is a sequence of simultaneous multiple round auctions. Compared with other bidding mechanisms, simultaneous multiple round bidding for interdependent licenses generates the most information about license values during the course of the auction and provides bidders with the most flexibility to pursue back-up strategies. Thus, it is most likely to award interdependent licenses to the bidders who value them most highly. It will also facilitate efficient aggregation across spectrum bands and geographic areas, thereby resulting in vigorous competition among several strong competitors who will be able to introduce rapidly a wide variety of services that will be highly valued by end users. Because of the superior information and flexibility it provides, this method is also likely to yield more revenue than other auction designs. Thus, we find that the use of simultaneous multiple round auctions will generally be preferred.

107. However, the Commission must balance the informational and bidding flexibility advantages of simultaneous multiple round auctions with the greater cost and complexity of running such auctions. For example, it is not our intention to put all PCS licenses up for bid at the same time, even though there is likely to be some degree of interdependence. Such a large simultaneous auction would most likely be unmanageable. As a result, we expect to have a sequence of simultaneous auctions. Licenses that are highly interdependent will be grouped together and auctioned simultaneously.

108. We do not now plan to use combinatorial bidding in the simultaneous multiple round auction context. We reach this conclusion because (1) the simultaneous multiple round auction design offers many of the aggregation

[93] The stand-by queue in the Banks-Ledyard-Porter AUSM mechanism proposed by NTIA mitigates the problem of bidders for individual licenses or smaller packages coordinating bids against bidders for larger packages. J. S. Banks, J. O. Ledyard, and D. P. Porter, "Allocating Uncertain and Unresponsive Resources: An Experimental Approach," *Rand Journal of Economics* 20, 1989: 1-22. According to NTIA, the stand-by queue "allows parties seeking individual licenses to coordinate their bids in order to beat the currently prevailing bid for a combination of licenses. The stand-by queue displays the amount that other bidders are willing to pay for the licenses that are part of a combination bid. A bidder can determine from the sum of these amounts how much to raise his or her own bid in order to surpass the current winning bid." *Ex parte* submission of NTIA, February 28, 1994, at 4, n. 6. Although the stand-by queue facilitates coordination it does not eliminate the free rider problem. Moreover, as the information in the stand-by queue grows with the number of bidders and licenses, bidders will have increasing difficulty efficiently combining contingent bids in the queue. Finally, there is the danger that some bidders for large combinations of licenses may strategically flood the queue with numerous contingent bids in order to prevent it from functioning.

[94] Robert J. Weber, "A Proposed Auction Methodology for the Allocation of PCS Licenses: Simultaneous Ascending-Bid Auctions," September 4, 1993, at 6.

[95] *See ex parte* submission of NTIA, February 28, 1994. Attached staff paper by Mark Bykowsky and Robert Cull. *See also ex parte* submission of Paul R. Milgrom, February 14, 1994, at 10. Professor Milgrom states that the Caltech experiments assumed that all the benefits of aggregating a group of licenses are lost if a single license is missing from the package.

advantages of combinatorial bidding without creating a free rider problem that may bias the outcome in favor of combinatorial bids, (2) full combinatorial bidding is highly complex and we lack a general methodology to simplify the full combinatorial procedure by choosing a limited set of combinations on which to allow bidding, and (3) the software for implementing full combinatorial bidding on a large scale does not now exist, and would be difficult to develop in a short time frame. In the future, however, we may decide to use a combinatorial bidding technique in simultaneous multiple round auctions if significant advances are made in the development of combinatorial procedures and they have been proven to work on a large scale.

109. *License Characteristics Leading to Selection of Preferred Design.* The two primary characteristics that will determine our choice of auction design are: (1) the degree to which licenses are interdependent, and (2) the expected value of the licenses being auctioned. Because we expect most licenses to be interdependent and of relatively high value, we have concluded that simultaneous multiple round auctions will generally best achieve the Commission's goals and therefore should be the Commission's preferred auction design.

110. When licenses values are interdependent, simultaneous multiple round auctions provide the information and flexibility for efficient bidding. In such auctions, if two licenses are substitutes, bidders will quickly switch from bidding on one license to bidding on the other if the price disparity does not reflect differences in value. This ensures that equivalent licenses will sell for equivalent prices. When licenses are complementary, bidders will have full flexibility to construct efficient aggregations of licenses based on simultaneous information about their prices. Thus, we would be inclined to select a simultaneous auction design when we believe that license values are significantly interdependent.

111. The other major factor leading us to select simultaneous multiple round auctions as our preferred option is the expected value of the licenses being auctioned. While in some instances, license values may be so low that the administrative costs, both to the Commission and to bidders, of conducting simultaneous multiple round auctions would exceed the value of the license, we anticipate that most licenses can be expected to have a relatively high value. However, as the value of licenses falls, the benefits of simultaneous multiple round bidding diminish relative to the cost and complexity of such auctions.[96] In such cases, the Commission may choose to employ less complex auction methods.

2. Alternative Methods

112. *Sequential Bidding.* We intend to tailor the auction design to fit the characteristics of the licenses that are to be awarded. Given the diverse characteristics of the various services that may be subject to auctions, simultaneous multiple round auctions may not be appropriate for all licenses. The less the interdependence among licenses, the less the benefit to auctioning them simultaneously. Because simultaneous auctions are more costly and complex to run, we may to choose a sequential auction design when there is little interdependence among individual licenses or groups of licenses. Such a design may include sequential oral auctions of individual licenses and a sequence of simultaneous auctions of multiple licenses.

113. *Single Round Bidding.* When the values of particular licenses to be auctioned are low relative to the cost of implementing a simultaneous multiple round auction, we will consider auction designs that are relatively simple, with low administrative costs and minimal costs to the auction participants. For example, with large numbers of low value licenses we may decide to implement single round sealed bidding to reduce implementation cost and expedite the licensing process. Because of the risk of collusion, the Commission may also wish to consider a single round of bidding in certain auctions where eligibility requirements limit participation to very few bidders.

114. *Combinatorial Bidding.* If we should choose a sequential auction design or single round bidding for some relatively low value licenses, and if we determine that there are some benefits of a particular level of aggregation for those licenses, we may accept combinatorial bids on a limited set of packages. While this does not have the administrative complexities or risks of full combinatorial bidding, it does raise the possibility of bias toward the combination bid. We therefore may consider instituting a premium, *i.e.*, the combinatorial bid would win only if it exceeded the sum of the bids for the individual licenses by at least a specified amount, in order to offset the free rider bias. A premium for combinatorial bids would also increase the incentive of bidders seeking packages of licenses to participate actively in the bidding for individual licenses. If we do decide to permit combinatorial bids, we would also need to specify whether these bids would be accepted before, after, or simultaneously with the individual bids, and when the combinatorial bids would be announced.

115. *Testing Alternative Methods.* The Congressional directive to "design and test multiple alternative methodologies under appropriate circumstances," 47 U.S.C. § 309(j)(3), implies that we should periodically reevaluate the efficiency of the auction designs we utilize and, where appropriate, test alternative auction design methodologies. Accordingly, in future Reports and Orders where we establish service-specific auction rules we will indicate a preferred auction design method for each particular service and specify any alternative auction design methods that we may test in auctioning licenses within that particular service. In each case, we will indicate the circumstances under which we may test an alternative design methodology and the procedures that will be applied when an alternative methodology is tested.

E. Bidding Procedures

116. We discuss below certain procedures that may be needed to implement the competitive bidding designs described in subsection C, *supra*. We may choose to incorporate certain of these procedures into the service-specific rules that we will adopt in future Reports and Orders for each auctionable service.

[96] The point is that the choice of auction technique should take into account the cost of running the auction. In some cases the likely benefits of a more complex auction technique may not exceed the additional costs of implementing it.

1. Sequencing

117. Whether we use our preferred approach of a sequence of simultaneous auctions or sequential individual auctions, the Commission must choose the sequence of what is auctioned. The importance of the choice of sequence increases with the degree of interdependence among the individual items or groups of items auctioned in sequence. We intend to minimize the importance of the choice of sequence by auctioning licenses sequentially only when there is not a high degree of value interdependence across the licenses (or groups) that are offered in sequence. As noted above, the groupings of the licenses into the various simultaneous auctions will be accomplished by aggregating together those licenses exhibiting the greatest degree of interdependence so that there will be limited interdependence across groups. Generally, we will announce the sequence in which licenses will be auctioned in the service-specific rules adopted in future Reports and Orders. For some services, the sequence of licenses to be auctioned will be announced by Public Notice prior to the auction.

118. Even if there is only limited interdependence among the licenses (or groups of licenses) to be auctioned sequentially, there still may be some tradeoffs in the choice of sequence, especially when implementing new auction procedures. In general, the highest value licenses or groups of licenses should be auctioned first because there is a cost to the public of delaying licensing, and the greater the value of the licenses the greater that cost. However, when implementing novel auction procedures, this general principle may not be appropriate. Auctioning groups of lower-value licenses first would allow the Commission to use its initial auction experience to improve the subsequent auctions for groups of higher-value licenses. Improvements in auction design and procedures are likely to have greater total value when applied to groups of higher-value licenses than lower-value licenses.

119. To the extent that some value interdependence remains among licenses (or groups of licenses) auctioned sequentially, there is an additional justification for auctioning licenses (or groups) in descending order of value. High value licenses or groups of licenses may be linchpins of aggregation strategies for certain bidders.[97] For example, a bidder may feel that it is crucial to obtain a license to serve the New York City metropolitan area in order to develop a service in the Northeastern United States. In a sequential auction, such a bidder would prefer the New York licenses auctioned before other Northeast markets. Knowing who has won such large markets is likely to be more important for bidding decisions about small markets than the converse. For this reason, the NPRM proposed that if individual PCS licenses are auctioned sequentially, regions should be offered in descending order of population. *See* NPRM at ¶ ¶ 53 and 125.

120. Auctioning high value licenses first may also increase auction revenue. Auctioning high value license first would increase the present value of revenue by tending to collect the largest payments first. Furthermore, to the extent that ordering interdependent licenses (or groups) large to small increases efficiency, it increases potential revenue, and might increase actual revenue realized by the government. On the other hand, selling first the licenses that can be expected to have the highest value may reduce overall revenues because of the effect of the winner's curse. If bidders in later auctions learn about common elements of license values from bids in earlier auctions, the incentive to shade down bids to avoid the winner's curse will be greatest with the first licenses, when the least information is available.

2. Duration of Bidding Rounds

121. In simultaneous multiple round auctions, bids can be submitted continuously with the high bids announced continuously, or bidding can occur in discrete rounds with high bids announced at the end of each round. NTIA's proposed "electronic iterative combinatorial auction," as demonstrated at Caltech on January 27, 1994, operated in real time with the high bids reported almost instantaneously.[98] PacBell and PacTel, on the other hand, both propose discrete rounds. With discrete rounds, the Commission can more readily control the pace at which the auction proceeds.

122. In determining the appropriate pace of the auction, we must trade off the benefits of rapidly completing the auction -- possibly earlier initiation of service -- against the benefits of providing bidders time to deliberate. With large numbers of high value licenses that may be combined across spectrum blocks and regions, bidders may need a significant amount of time to evaluate backup strategies and consult with their principals. For this reason, PacBell and PacTel argue that for broadband PCS, the benefits of simultaneous auctions are unlikely to be achieved if the auction proceeds too rapidly.[99] Specifically, PacBell proposes one bid per day and PacTel proposes three business days per round for broadband PCS.[100] Such a deliberate pace may not be appropriate, however, when license values are lower and fewer licenses are put up for auction simultaneously. In that case it may be appropriate to have several bidding rounds per day. The number of anticipated bidders may also affect our choice of the length of bidding rounds and duration between rounds. With more bidders the Commission may need to provide a longer period during which to submit bids, and a longer interval between rounds in which to process bids.

123. The duration of bidding rounds and the interval between rounds in simultaneous multiple round auctions will be announced in service-specific Reports and Orders, and may be varied by announcement during the course of an auction.[101] We generally intend to give bidders a single business day to submit bids, and conduct a new bidding

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[97] *See, e.g.*, comments of Bell Atlantic, Atttachment by Barry Nalebuff and Jeremy Bulow at 14.

[98] *Ex parte* submission of NTIA, February 28, 1994, Bykowsky-Cull staff paper at 5.

[99] PacBell reply comments, attachment by Milgrom and Wilson at 15-16; PacTel reply comments, attachment by McAfee at 4-6.

[100] Comments of PacBell, Attachment by Milgrom and Wilson at 19; comments of PacTel, Attachment by McAfee at 16.

[101] If we find that bidding is proceeding excessively slowly, we may decide to shorten the duration of rounds and/or intervals between rounds. On the other hand, we may increase the duration of rounds and/or intervals between rounds if an unexpectedly large number of bidders participate in the auction.

round each business day. We may, however, choose other round lengths and intervals between rounds. To the extent that we do, the length of rounds and the interval between rounds will generally vary directly with the number of licenses put up for bid simultaneously, the anticipated value of the licenses, and the number of bidders expected by the Commission.

3. Bid Increments

124. In multiple round auctions, whether they be sequential or simultaneous, the Commission will generally specify minimum bid increments. The bid increment is the amount or percentage by which the bid must be raised above the previous round's high bid in order to be accepted as a valid bid in the current round.[102] Imposing a minimum bid increment speeds the progress of the auction and, along with activity and stopping rules, discussed below, helps to ensure that the auction comes to closure within a reasonable period of time. Establishing an appropriate minimum bid increment is likely to be especially important in a simultaneous auction with a simultaneous closing rule. In that case, all markets remain open until there is no bidding on any license. A delay in closing one market would delay the closing of all markets.

125. For broadband PCS, commenters have suggested a minimum bid increment of five percent. PacTel, for example, argues that this provides a reasonable compromise between the goal of completing the auction quickly and that of revealing information about the distribution of valuations among bidders.[103] PacTel also has suggested, in the context of simultaneous auctions where markets close one by one, that the auctioneer should vary the bid increment, reducing it as the number of active bidders declines, in order to bring bidding on all licenses in the auction to a close at approximately the same time. PacBell, in the context of auctions that stop simultaneously, notes that reducing the bid increments in later stages of the auction may also be beneficial (attachment to reply comments at 25). This would move the auction quickly at the beginning while still allowing finer price movements when approaching final prices. Such a refinement would reduce chances of ties by allowing bidders to express relatively small differences in valuations. If any ties do occur, however, licenses will be awarded in the order the bids were received, starting with the earliest bid. This rule would provide bidders an incentive to submit bids early, reducing the chance of the FCC having to accept a large number of bid submissions just prior to the end of each bidding round.

126. We reserve the right to specify minimum bid increments in dollar terms as well as in percentage terms. The dollar minimum may be needed to ensure that the auction moves forward expeditiously if bidding begins at a very low dollar level. Based on the comments, our preferred basic minimum bid increment is five percent or x dollars, whichever is larger, where the dollar amount is set at approximately five percent of the expected license value. We shall retain discretion in future Reports and Orders establishing service specific rules to set and, by Public Notice before or announcement during the auction, vary the minimum bid increments for individual licenses over the course of an auction. We also may wish to vary the minimum bid increments with respect to different licenses being awarded in one auction. The dollar minimum bid increment would likely vary across classes of license, with larger bid increments set for more valuable licenses.

4. Stopping Rules for Multiple Round Auctions

127. Prior to each multiple round auction, the Commission will announce by Public Notice a stopping rule for determining when the auction is over. We seek a stopping rule that will (1) terminate the auction in a reasonable period of time, (2) be simple and clearly understood by participating bidders and observers of the auction process, and (3) in the case of simultaneous auctions, close all markets at approximately the same time. If markets were to close at very different times, important back-up bidding strategies could be foreclosed as in sequential auctions – once the auction for a particular license has closed it is too late to bid on that license as additional price information becomes available during the course of an auction.

128. When licenses are auctioned one at a time, deciding when to close a multiple round auction is a largely a matter of determining how long to wait after bidding ceases.[104] Typically, such auctions close when a brief amount of time passes with no one offering to raise the current high bid by the minimum bid increment. In oral auctions this is generally a matter of seconds. In the case of discrete bidding rounds, one must specify the number of rounds. For example, we could specify that, if there were no valid new bids for one round, the auction would close. Such a rule would be simple and help bring the auction to

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[102] PacTel proposes a "suggested" minimum bid increment instead of a required minimum bid increment. Under this proposal (described in further detail *infra*), if two bids were submitted and both were below the suggested minimum bid, the auction would close with the license awarded to the highest bidder. On the other hand, if both bids were above the minimum suggested bid the auction would continue. This mechanism is intended to provide bidders an incentive to increase bids by a minimum increment without making it an absolute requirement. *See* comments of PacTel, Attachment by R. Preston McAfee at 16-17. The Commission retains the discretion to use this approach instead of a mandatory minimum bid increment.

[103] Comments of PacTel, Attachment by R. Preston McAfee at 16.

[104] Stopping rules in the context of a single auction (or simultaneous auctions with markets closing one at a time) are not uniquely defined in terms of the length of time or the number of discrete rounds without bids. For example, McAfee, as noted above, proposes a stopping rule that differs depending on whether bids are below or above a "suggested minimum bid." Under McAfee's proposal, a market would close if no new bids are submitted in a round or if bids are submitted but there are fewer than two that exceed the previous round's high bid by more than the suggested bid increment. Comments of PacTel, Attachment by R. Preston McAfee at 16. The second part of this rule would appear to provide bidders an additional incentive to participate actively in an auction. Under this provision, a high bidder in the previous round would not have the opportunity to make a counter offer to the high bidder in the current round if there is only a single bid which exceeds the suggested minimum bid. This would seem to provide an added incentive for the high bidder to continue to raise its bid by the suggested bid increment in each round. The Commission retains the discretion to employ such a stopping rule.

a close quickly. Allowing more than one round might cause bidders to hold back (absent any activity rules) since they would not face the risk of losing the license if they did not bid in a given round. This same reasoning would apply to simultaneous auctions in which markets close one at a time and there is no activity rule. However, in a simultaneous auction with an activity rule to deter such holding back, it may be desirable to allow several rounds to pass without bidding before closing the auction. This would avoid any surprise endings to an auction, thus minimizing the possibility that a bidder is thwarted from exercising a back-up bidding strategy. It could also prolong the auction, however, and PacBell, the main proponent of simultaneous auctions with activity rules, proposes that a such auctions close if a single round passes in which no new acceptable bids are submitted for any license.[105]

129. *Stopping a Simultaneous Auction Market-by-Market.* In simultaneous auctions, the stopping rules must also specify whether to close markets individually or simultaneously. PacTel proposed allowing markets to close one at a time, but also proposed a mechanism to increase the likelihood that all markets close at approximately the same time. Under PacTel's plan, minimum bid increments would be reduced as bidding activity (as measured by the number of active bidders) slows down. This would tend to result in rapid price movement in markets far away from final prices and slow movement in markets close to final prices. However, this mechanism may not work well when the top few bidders have much higher valuations than the other bidders. In this case the presence of only a few bidders does not indicate that the current high bid is close to the final price. But under their mechanism the bid increments would be small and bidding could continue for a long time, resulting in that market closing later than others. PacTel estimates that an auction conducted under its proposal would close after approximately one month (assuming its timetable of three days between bids and initial bidding increment of five percent).

130. *Stopping a Simultaneous Auction at the Same Time in all Markets.* PacBell, on the other hand, proposed closing bidding simultaneously -- bidding would remain open on all licenses until bidding stops on every license. This approach has the advantage of providing bidders full flexibility to bid for any license as more information becomes available during the course of the auction, but it may lead to very long auctions. Bidders might hold back (absent the activity rules proposed by PacBell in its reply comments) because there would be a cost of committing oneself early to a bid with little offsetting benefit since the chance of the entire auction closing before they could bid would be slight. Furthermore, such a stopping rule might be vulnerable to strategic delay. An incumbent wireless provider, for example, might prolong the auction by increasing bids on low value licenses simply to delay closure on higher value licenses. In its reply comments, PacBell addresses these concerns about speed of closing. To assure that bidders do not hold back, it proposes an activity rule (*see* discussion *infra)* that requires bidders to be active in each round. PacBell estimates that a simultaneous auction of all broadband PCS licenses would take 40 to 60 rounds using their stopping and activity rules. As a fail safe mechanism, in part to address the possibility of strategic delay, it proposes that if an auction conducted using its stopping and activity rules does not close after 40 rounds, the Commission could announce that, after one additional round of bidding, the auction would close.[106]

131. *Hybrid Stopping Rules.* Hybrid stopping rules are also possible. A simultaneous stopping rule, along with a relatively complex activity rule, might be used for higher value licenses where the magnitude of the benefits of simultaneous closing are great. For lower value licenses, where the loss from eliminating some back-up strategies is less, markets might be allowed to close individually. For example, in the broadband PCS context, a simultaneous stopping rule might be applied to all Major Trading Area (MTA) licenses while a simultaneous auction for Basic Trading Area (BTA) licenses might be allowed to close market by market. A more complex hybrid would be to close the largest 10 or 15 MTAs simultaneously, while closing the remaining markets on an individual basis once the top markets had closed. That is, when three rounds have passed without bids on any of the top licenses, then all licenses on which there has been no bidding would close. Each remaining market would close when bidding stops in that market. Under this approach the outcome of large markets would be known before bidding closed on smaller properties. This plan would, however, prevent bidders on large MTAs from using information about small MTAs that becomes available subsequent to the close of the large markets. But, presumably information about prices and ownership of large markets is more important in making bidding decisions about small markets than vice versa. Such hybrid approaches might simplify and speed up the auction process without greatly sacrificing efficiency and revenue.

132. *Preferred Stopping Rules.* Based on the foregoing analysis we prefer the following stopping rules: (1) when auctioning licenses one at a time, or simultaneously and closing markets one at a time -- a market closes if a single round passes in which no new acceptable bids are submitted for that license; (2) when auctioning licenses simultaneously and closing markets 9 simultaneously -- all markets close if a single round passes in which no new acceptable bids are submitted for any license. We favor these rules because they are simple and are likely to promote an expeditious close to auctions. We are also persuaded, for the reasons discussed above, that simultaneously closing markets for interdependent license is most likely to award licenses to the bidders who value them most highly. We recognize, however, that this approach may be more costly to implement for both the Commission and bidders, and thus may wish to adopt a hybrid approach in which markets for lower value licenses close one at a time. Moreover, we will retain the discretion to declare by announcement at any point during a multiple round auction that the auction will end after one additional round (or some other specified number of additional rounds). This will ensure ultimate Commission control over the duration of the auction. We also reserve the right to vary the interval at which bids are accepted by announcement during the course of a

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[105] Comments of PacBell, Attachment by Paul Milgrom and Robert Wilson at 19.

[106] Reply comments of PacBell, Appendix to attachment by Milgrom and Wilson at 5. Professors Milgrom and Wilson propose that if this procedure is invoked the Commission would accept final bids only for licenses on which the highest bid increased in one of the last three rounds. No new bids would be accepted for other licenses.

simultaneous auction (*e.g.*, run two rounds per day rather than one), in order to move the auction toward closure more quickly.

5. Activity Rules

133. In order to ensure that simultaneous auctions with our preferred simultaneous stopping rule close within a reasonable period of time, an activity rule is likely to be necessary to prevent bidders from waiting until the end of the auction before participating. Because our preferred simultaneous stopping rule generally keeps all markets open as long as anyone wishes to bid, it also creates an incentive for bidders to hold back until prices approach equilibrium before making a bid and risking paying a penalty for withdrawing. As noted above, this could lead to very long auctions. An activity rule is less important when markets close one by one because failure to participate in any given round may result in losing the opportunity to bid at all if that round turns out to be the last. This Order adopts rules which retain the flexibility to decide on an auction-by-auction basis whether we will use an activity rule, and if so what type. We will announce the activity rule, if any, that will be used in each auction by Public Notice before the auction.

134. Where we decide to employ an activity rule, we will seek one that (1) moves auctions along at an appropriate speed, (2) provides bidders with the sufficient flexibility to pursue a wide range of alternative bidding strategies, and (3) is simple and clearly understood by participating bidders. Designing an effective activity rule involves making tradeoffs among these objectives. For example, any incentive to induce bidders to actively participate (beyond a single license) in early rounds constrains the flexibility to pursue some bidding strategies (*e.g.*, holding back). The intention is to design an activity rule which, when used in conjunction with a simultaneous stopping rule, forecloses fewer important bidding strategies than would auctions in which markets close individually.

135. *Activity Rules Proposed by Milgrom and Wilson.* The most detailed discussion in the record on activity rules is in the papers prepared by Professors Paul Milgrom and Robert Wilson and submitted by PacBell.[107] The initial Milgrom-Wilson proposal simply required each bidder to be active on at least one license in each round of bidding. In a particular round of bidding, a bidder is considered "active" with respect to a particular license if the bidder (1) has the high bid for that license from the previous round, or (2) has submitted a bid that exceeds the previous round's high bid for that license by at least the minimum bidding increment. Requiring each bidder to be active on at least one license is simple and does not foreclose any back-up bidding strategies of any serious bidder, but may not be adequate to ensure that an auction with a simultaneous stopping rule closes in a reasonable amount of time. Using this rule, we would also run the risk that it may become necessary to close an unreasonably long auction in a crude fashion, for example by announcing that only one more round of bids will be accepted. In such a case, the auction may generate little information and important bidding opportunities may be foreclosed.

136. At the cost of some added complexity and some limitation on bidding flexibility, we may wish to impose a more stringent activity rule in auctions with simultaneous closing rules. Professors Milgrom and Wilson, in their attachment to PacBell's reply comments (Milgrom and Wilson attachment at 22 and appendix at 7), suggest such a stricter activity rule. The rule encourages bidders to participate in early rounds by limiting their maximum participation to some multiple of their minimum participation level. Milgrom and Wilson propose that bidders be required to declare their maximum eligibility in terms of MHz-pops, and make an upfront payment equal to two cents per MHz-pop. (*See* Section IV.B., *infra.*) That is, bidders would be limited to bidding on licenses encompassing no more than the number of MHz-pops covered by their upfront payment. It is important to note that bidders would have the flexibility to shift their bids among any licenses for which they have applied so long as the total MHz-pops encompassed by those licenses does not exceed the number for which they made an upfront payment. Moreover, bidders would be able to ensure themselves the freedom to participate at whatever level they deemed appropriate by making a sufficient upfront payment.[108] To preserve their maximum eligibility, however, bidders would be required to maintain some minimum activity level during each round of the auction.

137. Under the Milgrom-Wilson proposal, the minimum activity level, measured as a fraction of the self declared maximum eligibility, would increase during the course of the auction. Milgrom and Wilson divide the auction into three stages. During the first stage of the auction, a bidder would be required to be active on licenses encompassing one-third of the MHz-pops for which it is eligible. The penalty for falling below that activity level would be a reduction in eligibility. At this stage, bidders would lose three MHz-pops in maximum eligibility for each MHz-pop below the minimum required activity level. Put another way, each bidder would retain eligibility for three times the MHz-pops for which it is an active bidder, up to the MHz-pops specified in the bidder's upfront payment. For example, if a bidder made an upfront payment on 600 million MHz-pops, the minimum activity level would be 200 million MHz-pops during the first auction stage. If it bid on only 150 million MHz-pops, its eligibility would be reduced to a total of 450 million MHz-pops.

138. In the second stage, bidders would be required to be active on two-thirds of the MHz-pops for which they are eligible. The penalty for falling below that activity level would be a loss of 1.5 MHz-pops in eligibility for each MHz-pop below the minimum required activity level. In other words, each bidder would retain eligibility for 1.5 times the MHz-pops for which it is an active bidder, up to the MHz-pops specified in the bidder's upfront payment. For example, a bidder who made an upfront payment on 600 million MHz-pops would have a minimum activity level of 400 million MHz-pops during the second stage of the auction. If it bid on only 300 million MHz-pops, its eligibility would be reduced to a total of 450 million MHz-pops.

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[107] *See* comments of PacBell, Attachment by Milgrom and Wilson at 19; reply comments of PacBell, Attachment by Milgrom and Wilson at 21-25.

[108] The cost of buying additional initial eligibility would depend on the difference between a bidder's opportunity cost of funds and the rate of interest, if any, paid by the Commission on the upfront payments.

139. In the third stage, bidders would be required to be active on licenses encompassing all of the MHz-pops for which they are eligible. The penalty for falling below that activity level would be a loss of one MHz-pop in eligibility for each MHz-pop below the minimum required activity level. Each bidder thus would retain eligibility equal to its current activity level (1 times the MHz-pops for which it is an active bidder).

140. Milgrom and Wilson propose moving from stage one to stage two when, over three rounds of bidding, the high bid has changed on five percent or fewer of the licenses (measured in terms of MHz-pops) being auctioned. Stage three would begin when the high bid has changed on two percent or fewer licenses over three rounds.[109] Finally, to avoid the consequences of clerical errors and to compensate for "unusual circumstances that might delay a bidder's bid preparation or submission on a particular day," Milgrom and Wilson propose that each bidder could request and automatically receive a waiver of the activity rule once every three rounds. We believe that some waiver procedure is a critical element of the Milgrom-Wilson activity rule, since the Commission would not wish to reduce a bidder's eligibility due to an accidental act or circumstances not under the bidder's control.

141. *Other Activity Rules.* The Milgrom-Wilson activity rule could be modified by adjusting the percentages specified in the transition rule between auction stages, changing the number of stages, adjusting the minimum required activity level during each stage, or altering the waiver procedure. For example, the first stage could be eliminated and the auction could start with the two-thirds minimum activity requirement of the second stage. Other activity rules may be possible as well. The Commission could, for example, require that a bidder's activity level remain within a single range throughout the auction. That is, a bidder's eligibility would be reduced to its current activity level only if it is active on less than some percent (*e.g.*, 75 percent) of the MHz-pops it specified in its upfront payment. This rule would be simpler than the Milgrom-Wilson rule, but provide less bidding flexibility. Rules that would be more complex but provide greater bidding flexibility are also possible. Instead of a reduction in eligibility for bidding at less than the required activity level, the activity rule could specify a bid premium for later expanding bidding activity beyond the level that would be allowed under the Milgrom-Wilson rule. The premium could be directly proportional to the number of MHz-pops in excess of that level. Bidders would not, however, be permitted to bid on more MHz-pops than covered by their upfront payments. The waiver procedure proposed by Milgrom and Wilson could be modified as well. A simpler alternative would be to allow bidders five automatic waivers during the course of an auction (for failure to meet the minimum activity requirement) and the discretion to issue additional waivers for circumstances beyond a bidder's control, such as an earthquake.

142. *Choosing Among Alternative Activity Rules.* In choosing auction specific activity rules, it is important to keep in mind the tradeoffs among simplicity, flexibility, and speed of auction completion. For example, eliminating stages one and two of the Milgrom-Wilson activity rule would simplify the procedure at the expense of reduced bidding flexibility and could result in an auction that closes too quickly to allow adequate time for consideration when there are many interdependent high-value licenses. Starting an auction with the third stage of the Milgrom-Wilson activity rule would prevent a bidder from initially bidding on certain core licenses critical to its business plans and then expanding its bidding to other licenses if prices turn out to be low enough that it can do so within its budget. Instead, it would need to bid initially on the largest collection of licenses it might want. If prices turn out to be higher than expected, the bidder would need to scale back, but it might get stuck with the wrong properties. That is, it might find that it risks being outbid on its core properties but not on the less essential ones. It would then need to withdraw its high bids on its non-essential properties in order to have sufficient capital to ensure that it could pay for its core properties. This problem would be less likely to occur under the three stage activity rule proposed by Milgrom and Wilson, because the bidder would not need to commit itself to the additional properties until stages two or three, when price information would be relatively reliable.

143. We are concerned, however, about the possible complexity of a three stage Milgrom-Wilson activity rule. One way to reduce this complexity from the perspective of bidders, without sacrificing auction flexibility or speed, would be to develop appropriate bidding software. It is our intention to develop such software and make it available to all bidders in auctions in which a Milgrom-Wilson type activity rule is used. Such software which would (1) automatically calculate the activity level associated with any possible bid on a license or licenses, (2) show the minimum required activity level for the current auction stage, (3) automatically alert the bidder, prior to submitting a bid, if a bid falls below the bidder's minimum activity level, and show the consequences in terms of future eligibility of submitting such a bid, (4) show the bidder's eligibility in terms of MHz-pops, (5) automatically inform the bidder, prior to bid submission, as to whether a bid is valid, and (6) show the number of automatic waivers the bidder has used and the number still available.

144. *Preferred Activity Rule.* In light of the foregoing analysis, when the Commission employs a simultaneous stopping rule, its preferred activity rule will be a three stage Milgrom-Wilson rule. The specific parameters of the rule, including the minimum required participation level during each stage and the overall activity level specified in the transition rule between auction stages will be determined in subsequent service specific Reports and Orders.[110] However, the Commission retains the flexibility to choose among the following other activity rules on a case-by-case basis: (1) a Milgrom-Wilson rule with one or two stages, (2) the requirement that bidders be active on a single license, (3) a rule, as described above, that a bidder's activity level remain within a single range throughout the auction, (4) a rule, as described above, that replaces the maximum al-

[109] To avoid the risk of an excessively long auction, they also propose that the Commission retain the ability to declare at any time during an auction that the auction is moving to the next stage.

[110] The Commission would also retain the ability to speed up an auction by announcing, at any time during an auction, that the next stage of the auction (with a higher minimum participation level) will begin in the next bidding round.

lowed bidding levels in the Milgrom-Wilson rule with a bidding premium for exceeding those maximums, or (5) a combination of the foregoing rules.

145. We also conclude that while some waiver procedure is necessary in conjunction with a Milgrom-Wilson activity rule, a rule less complex than the one they proposed is likely to be adequate. Our preferred procedure will be to allow bidders five automatic waivers during the course of an auction (for failure to meet the minimum activity requirement) and the discretion to issue additional waivers for circumstances beyond a bidder's control. We retain the flexibility, however, to adjust the number of automatic waivers, or to institute a rule that allows one free waiver during a specified number of bidding rounds.

6. Bid Withdrawal and Default

146. In either sequential or simultaneous auction designs, a bidder may wish to withdraw one or more of its high bids. As discussed below, if a high bid is withdrawn prior to the close of a simultaneous multiple round auction, the Commission will impose a penalty equal to the difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission.[111] No withdrawal penalty will be assessed if the subsequent winning bid exceeds the withdrawn bid. If a winning bidder defaults after the close of such an auction, the defaulting bidder will be required to pay the foregoing penalty plus an additional penalty discussed below.

147. *Bid Withdrawal Penalty.* Allowing bidders to withdraw bids without ever paying a penalty would encourage insincere bidding. Insincere bidding, whether purely frivolous or strategic, distorts the price information generated by the auction process and reduces its efficiency. Strategic bidding is likely to be the most damaging. For example, a strategic bidder might attempt to deter a rival from acquiring a regional collection of licenses (or from entering altogether) by bidding up the price of key licenses and then withdrawing.

148. An excessive bid withdrawal penalty, on the other hand, would tend to discourage the efficient aggregation of licenses. Absent full combinatorial bidding, bidders attempting to put together a collection of licenses face the risk that they may be left holding licenses they no longer want. In either sequential or simultaneous auctions, a bidder may bid high on one property in the expectation that it will also win a complementary property, only to find that it is outbid on the complementary property. If the penalty for bid withdrawal is too high, bidders will tend to be too cautious in attempting to aggregate licenses.

149. A point to note in considering the appropriate level of bid withdrawal penalty is that the existence of an after-market generally places an upper limit on the amount that bidders will pay to the government for bid withdrawal. If the bid withdrawal penalty is set too high, winning bidders who realize that they bid too much will generally pay for the license and resell it in the after-market. The cost of doing this would be the difference between the bid price and the price obtained in the after-market plus any transaction costs (including the cost of financing the initial purchase). Only those bidders who cannot raise sufficient capital to acquire the license for later resale, or those who are disqualified from acquiring the license would choose to withdraw and pay the government significantly more than this.[112]

150. Professor R. Preston McAfee, in a January 10, 1994, *ex parte* filing on behalf of PacTel, proposes a bid withdrawal penalty, in the context of simultaneous multiple round auctions, which we believe generally provides an appropriate balance between the risks of too high a penalty and those of too low a penalty. He proposes that the penalty for withdrawing a high bid equal the difference between the amount bid and the amount the government ultimately receives for the license. If the amount ultimately received for the license is greater than the amount of the withdrawn bid, no payment would be required.[113]

151. We believe, for the following three reasons, that this is an appropriate penalty where the high bid is withdrawn during the course of a simultaneous multiple round auction.[114] First, it provides bidders with appropriate incentives to avoid withdrawing bids. It compels bidders who may ultimately withdraw to consider the external consequences of both how much they bid and the timing of their withdrawal. The more the price is bid up above the final sales price the greater the distortion in information generated by the auction, and the greater the potential for strategically limiting entry of potential competitors. Thus it is appropriate that the bid withdrawal penalty should increase with the amount of the withdrawn bid, when that amount exceeds the market price. Similarly, the later in

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[111] If a license is re-offered by auction, the "winning bid" refers to the high bid in the auction in which the license is re-offered. If a license which is the subject of withdrawal or default is instead offered to the highest losing bidders in the initial auction, the "winning bid" refers to the bid of the highest bidder who accepts the offer. Losing bidders would not be required to accept the offer, *i.e.*, they may decline without penalty. We wish to encourage losing bidders in simultaneous multiple round auctions to bid on other licenses, and therefore will not hold them to their losing bids on a license for which a bidder has withdrawn a bid or on which a bidder has defaulted.

[112] In determining the maximum amount that could be charged for a bid withdrawal penalty one must take into account the fact that the price at which a license can be transferred in the after-market is uncertain. Risk averse bidders would be willing to pay a fixed withdrawal penalty which exceeds the expected value of the difference between the bid and final sales price plus transaction costs.

[113] McAfee also proposes that the license reverts to the second highest bidder, who may withdraw without penalty. Alternatively, the Commission could restart bidding at some fraction of the withdrawn bid, say 80 percent, or at a fraction of the second highest bid. We generally favor the last approach. Using a fraction of the second highest bid instead of a fraction of the withdrawn bid would avoid the problem of setting the starting price too high in the event that there is a large gap between the highest and second highest bids. It would also take into account the possibility that the second highest bidder is no longer willing to pay as much as it originally bid. Finally, this approach would be administratively less burdensome than checking whether the second highest bidder wanted the license. If no bids are received at the suggested starting price the Commission would retain the right either to lower the price or to accept bids that are below the price.

[114] In the unlikely event that there is more than one withdrawal on the same license, we will hold each withdrawing bidder responsible only for the difference between its withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. This procedure ensures that each bidder who withdraws is responsible for its bid. In our view, §§ 309(j)(3) and (4)(B) afford us ample authority to impose such penalties for bid withdrawal.

the auction a high bid is withdrawn, the higher the penalty should be and the higher it is likely to be. The damage to the auction process is greater when bids are withdrawn late in the process because other bidders have fewer opportunities to adjust their strategies and thus there is less the chance the license will be awarded to the bidder who values it most highly. For the same reason, the ultimate sales price is likely to be less, and hence the bid withdrawal penalty likely to be higher. The penalty compels bidders to consider the costs imposed on the auction process along with the benefits they expect to receive from withdrawal.

152. Second, the penalty precisely protects the government from loss of revenue associated with bid withdrawal. A fixed withdrawal penalty would be too great when the gap between the final sales price and bid price is small and too little when it is large.

153. Third, the bid withdrawal penalty adopted here is likely to be fairer to designated entities, who are less likely to have the option of purchasing a license and reselling it as an alternative to bid withdrawal. As discussed above, most bidders would not pay a fixed bid withdrawal penalty if it would be less costly to purchase the license and resell it in the after-market. But capital constrained firms, and firms subject to strict resale limitations would not have this option. In contrast to a fixed bid withdrawal penalty, the penalty adopted here would result in equal treatment for all firms, since the penalty for bid withdrawal would approximate the loss incurred by accepting a license and then reselling it.

154. *Default Penalty.* If a bid is withdrawn after a simultaneous multiple round auction has closed, *i.e.*, the winning bidder "defaults," the winning bidder will be required to pay the foregoing penalty plus an additional penalty equal to three (3) percent of the amount of the winning bid the next time the license is offered by the Commission, or three percent of the amount of the defaulting bidder's bid, whichever is less. The additional penalty is intended to provide an incentive for bidders wishing to withdraw their bids to do so prior to the close of the auction. It is appropriate to create such an incentive because a withdrawal that occurs after an auction closes (default) is likely to be more harmful than one that occurs before closing. First, default reduces the efficiency of the assignment process. If withdrawal occurs before the auction closes other bidders will have greater opportunities to revise their bidding strategies to account for the availability of the withdrawn license. Once the auction closes, however, only those licenses on which bidders defaulted (plus any licenses not sold during the auction) will be put up for re-auction, so other bidders will have little opportunity to revise their strategies. Thus, default would reduce the likelihood that licenses will be assigned to those who value them the most. Second, default imposes extra costs on the government. If a bidder defaults, the government must generally incur the additional expense of re-auctioning the license.[115] In contrast, the administrative cost of announcing a bid withdrawal prior to the close of an auction and accepting additional bids would be minimal.

155. In setting the additional penalty for default, the Commission must take into account the presence of the after-market as a limitation on the maximum collectable penalty. Based on the fact that brokers of cellular licenses typically charge a three percent commission (*See* Notice of Proposed Rulemaking and Tentative Decision in GN Docket No. 90-314 and ET Docket No. 92-100, 7 FCC Rcd 5676 (1992), at n.41), we estimate the after-market transaction costs to be approximately three percent. We believe that this is an appropriate additional penalty for default. If the Commission were to charge this additional penalty, we would expect most bidders to prefer paying the default penalty than purchasing and reselling the licenses in the after-market, because the Commission is likely to be able to re-auction licenses more quickly and to get higher sales prices assuming it puts all defaulted (and otherwise unsold) licenses up for bid shortly after the auction closes. If the Commission were to set a substantially higher penalty, few bidders would default but would instead resell unwanted licenses in the after-market. Not only would this be unfair to entities unable to rely on the after-market, it would likely reduce the efficiency of the auction process, because we anticipate that FCC simultaneous auctions of defaulted (and otherwise unsold) licenses will generally assign licenses more efficiently than license-by-license transactions in the after-market. On the other hand, an additional penalty of substantially less than three percent would not sufficiently discourage default.

156. *Penalties in Open Outcry Auctions.* In the case of open outcry auctions, the Commission may choose not to impose any penalty for bid withdrawal during the course of an auction and instead rely only on the default penalty described above to discourage insincere bidding. The default penalty will be assessed if a bidder fails to make the down payment on a license, fails to pay for a license or is disqualified after the close of an auction. There are two reasons for this possible modification. First, the damage from bid withdrawal is less when only one license is up for auction at a time than when multiple licenses are auctioned simultaneously. In a simultaneous auction, bids on one license will affect other bidders' decisions about other licenses. In an open outcry auction, however, bids during the course of the auction will have little or no effect on other decisions. Provided that other bidders are also not held to their bids (so they are not committed to bids based on faulty estimates of common values inferred from the withdrawn bid), the only damage from such withdrawal would be delay. In an open outcry auction such delay may be minimal. Second, in open outcry auctions the possibility for mistaken bids is greater than when bids are submitted electronically or in writing.

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[115] In the event that a winning bidder in a simultaneous multiple round auction defaults on its down payment obligations, the Commission will generally re-auction the license either to existing or new applicants. If, however, only a small number of relatively low value licenses are to be re-auctioned, the Commission may choose to offer the license to the highest losing bidders (in descending order of their bids) at their final bids, since the cost of running an auction may not exceed the benefits. If a high bidder defaults or is disqualified after having made its down payment, the Commission will conduct another auction for the license. New applicants will be given the opportunity to participate in such an auction, because so much time is likely to have passed that different parties may be interested in bidding and existing applicants may have different valuations of the license.

157. *Penalties in Single Round Bidding.* In the case of single round bidding, the foregoing analysis of penalties for withdrawal and default must be modified to reflect the fact that bids cannot be withdrawn during the course of an auction because there is only a single round. If a bid is withdrawn before the bids are opened no harm would be done and no penalty will be assessed. If a high bid is withdrawn after the bids are opened but before the high bidder has been notified the harm would also be minimal. The Commission can quickly proceed to offer the license to the party with the next highest bid and the situation would be as if the first high bid had not been made. If, however, a high bidder in a single round auction defaults after it has been notified, the licensing process is likely to be delayed. To provide bidders in single round auctions an incentive to avoid default Cand the associated delays, and to protect the government against the revenue loss from default, we intend to impose a default penalty equal to the difference between the high bid and the next highest bid.[116] No additional three percent penalty will be charged because the two justifications for its imposition in multiple round auctions do not apply. In a single round auction, the argument about creating an incentive to withdraw during the course of an auction does not apply since there would be only a single bidding round and the Commission would not incur additional costs because it will not generally need to run another auction.

7. Releasing Bid Information

158. In multiple round auctions the Commission must decide how much bid information to release during the auction. One option (proposed by PacBell) would be to announce all bids plus the identities of the high bidder in each round.[117] Maximizing the information available to bidders minimizes bidder uncertainty and thus may increase bids by alleviating the winner's curse. It may also increase efficiency of license assignments by providing bidders with useful information about the likely availability of complementary services and standards both inside and outside the areas they wish to serve. On the other hand, releasing the identities of the high bidders may foster strategic manipulation, *e.g.*, bidding up licenses critical to rivals' business plans.[118] It also facilitates collusion among bidders by identifying high bidders to each other and enables parties to enter into bid rigging agreements. We believe that the risk of collusion and strategic manipulation outweighs the benefits of additional information from releasing the identities of the high bidders. We therefore will adopt an intermediate option of announcing bidder identification numbers and bid amounts but not the identities of the bidders. This option provides some useful information to bidders without significantly increasing the risk of anticompetitive behavior.

8. Delay, Suspension or Cancellation of Auction

159. By Public Notice or by announcement during an auction, the Commission may delay, suspend or cancel an auction in the event of a natural disaster, technical obstacle, evidence of auction security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and competitive conduct of the competitive bidding. In such cases, the Commission may, at its sole discretion, resume the auction starting from the beginning of the current or some previous round or may cancel the auction in its entirety.

IV. PROCEDURAL, PAYMENT AND PENALTY ISSUES

160. This section establishes general rules and procedures that will govern the competitive bidding process, including procedures for the filing of applications and rules concerning bidder and licensee qualifications, upfront and down payments, penalties that will be assessed in certain circumstances, and the use of minimum bid and reservation prices. These rules are structured to ensure that bidders and licensees are qualified and will be able to construct systems quickly and offer service to the public. By ensuring that bidders and license winners are serious, qualified applicants, these rules will minimize the need to re-auction licenses and prevent delays in the provision of service to the public.

A. Pre-Auction Procedures and Bidder and Licensee Qualifications

161. Section 309(j)(5) provides that no party may participate in an auction "unless such bidder submits such information and assurances as the Commission may require to demonstrate that such bidder's application is acceptable for filing." 47 U.S.C. § 309(j)(5). Moreover, "[n]o license shall be granted to an applicant selected pursuant to this subsection unless the Commission determines that the applicant is qualified pursuant to [Section 309(a)] and Sections 308(b) and 310" of the Communications Act. *Id.* As we noted in the NPRM, the legislative history explains that the Commission may require that bidders' applications contain all information and documentation sufficient to demonstrate that the application is not in violation of Commission rules and that applications not meeting those requirements may be dismissed prior to the competitive bidding. *See* NPRM at ¶ 96, *citing* H.R. Rep. No. 103-111 at 258.

162. In the NPRM, we made a number of proposals to implement this statutory provision that were designed to streamline the processing of auction applications. NPRM at ¶ ¶ 96-101. We proposed that, in response to a Commission Public Notice of a filing window or cut-off date in services that are subject to competitive bidding, all applicants interested in participating would be required to file a short-form application (modeled on the Commission's "Transmittal Sheet for Cellular Applications"). *Id.* at ¶ 97.

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[116] If there are multiple defaults each bidder would be responsible for the difference between its bid and the next highest bid. Holding each bidder in a single round auction responsible for the difference between its bid and the next highest bid would discourage cascading defaults. Moreover, the argument made above (for the case of simultaneous multiple round auctions) that losing bidders should not be held to their bids does not apply here because single round bidding does not provide losing bidders with the opportunity to switch bidding strategies within the auction.

[117] Comments of PacBell, Attachment by Milgrom and Wilson at 19. *See also* reply comments of PacBell, Attachment by Milgrom and Wilson at 26.

[118] *See* comments of NYNEX, Attachment by Harris and Katz at 9.

Submission of a short-form application prior to the auction, we noted, would reduce the administrative burdens of the initial stages of the auction process, avoid unnecessary delay in the initiation of service, and encourage applicants to participate in the process. We asked whether applicants should also be required to submit a long-form application and an application fee prior to the auction, or whether the long-form application should be submitted subsequent to the auction. *Id.*

163. The comments generally support the Notice's proposals to streamline the processing of auction applications, particularly as they would apply to PCS applications.[119] The majority of commenters addressing this issue agree that we should require only a short-form application prior to competitive bidding, and that only winning bidders should be required to submit a long-form license application after the auction.

164. Generally, we intend to adopt the following procedures for conducting auctions.[120] Usually, no less than 75 days before each scheduled auction the Commission will release a Public Notice announcing the auction. This Public Notice may be issued either by Commission order or Bureau release. The initial Public Notice will normally contain the following information: the license(s) to be auctioned and the time, place and method of competitive bidding to be used, including applicable bid submission procedures, bid withdrawal procedures and penalties, stopping rules and activity rules. This Public Notice will also specify the filing window, if any, for short-form applications and bidder certifications, as well as the amounts and deadlines for submitting the applicable filing fee, upfront payment and down payment. We will not accept applications filed before or after the dates specified in Public Notices.[121] Applications submitted before release of a Public Notice announcing an auction for particular license(s), or before the opening date of the filing window specified therein, will be returned as premature. Applications submitted after the deadline specified by Public Notice will be dismissed, with prejudice, as untimely. Soon after release of the initial Public Notice, an auction information package would be made available to prospective bidders.

165. In order to reduce the administrative burdens on bidders and the FCC and minimize the potential for delay, bidders will be required to submit only short-form applications and bidder certifications together with any applicable filing fee[122] prior to the auction.[123] As indicated above, short-form applications will be due on a date to be specified by Public Notice or Commission rule. If the Commission receives only one application that is acceptable for filing for a particular license, mutual exclusivity would be lacking and the Commission would be prohibited from using competitive bidding to award the license. Under these circumstances, the Commission will issue a Public Notice cancelling the auction for this license and establishing a date for the filing of a long-form application, the acceptance of which would trigger the relevant procedures permitting petitions to deny.

166. The short-form applications and bidder certification forms will normally require applicants to provide the following information: 1) the license(s) for which the applicant wishes to bid;[124] 2) the applicant's name;[125] 3) the identity of the person(s) authorized to make or withdraw a bid; 4) certifications that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the Communications Act, and is in compliance with the foreign ownership provisions contained in Section 310 of the Communications Act and any other service-specific qualification rules applicable to the

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[119] *See, e.g.*, comments of Cellular Service, Inc. at 15; GCI at 14; Liberty Cellular at 5; and Pacific Telecom Cellular, Inc. at 5-6. The Association for Independent Designated Entities (AIDE) argues in its comments and again in its reply comments that we have not afforded sufficient notice in the NPRM to permit us to promulgate rules for the auction of PCS. We disagree. The NPRM was sufficiently specific to draw numerous and extensive comments from interested parties on the proposed procedures. *See, e.g.*, NPRM at ¶ ¶ 120-130, 167-175. The Commission proposed to base its PCS application filing and processing rules on existing rules used for the processing of other mobile radio services, such as the cellular radio service and the private land mobile radio services, and proposed the use of a one-day filing window for PCS applications. We made reference to specific rules in the cellular service and in the private land mobile radio service. We proposed use of both a short-form and a long-form application to speed processing, and asked when we should consider petitions to deny. We further asked whether we should use combinatorial bidding, proposed to auction the biggest markets first in both broadband and narrowband PCS, and proposed a specific upfront payment in dollars for nationwide narrowband PCS. We proposed that no modifications be allowed until after a winning bidder emerged, and proposed which forms applicants should use to apply for PCS licenses. Finally, we proposed the application fees we proposed to charge and advanced numerous other proposals as well. We received voluminous comments from many parties on these issues. In view of the extensive and detailed comments we received on all aspects of our proposal, we disagree with AIDE's conclusion that we must issue a further notice of proposed rule making before adopting specific procedural rules for PCS. We shall announce those rules in a subsequent Report and Order in this proceeding.

[120] We may decide in the future to alter some or all of the procedures detailed herein, or to tailor them to specific service rules, after we have had an opportunity to assess their effectiveness.

[121] We may decide in some services to accept applications before scheduling an auction. This will be the case in services where mutually exclusive applications are filed during filing windows that open automatically by operation of our Rules. In these situations, we will provide through a subsequent Public Notice relevant information concerning the auction in which these licenses will be awarded.

[122] This fee would be based on the applicable processing fee for the service in question. *See* 47 U.S.C. § 158(g); 47 C.F.R. Part 1, Subpart G. Whenever funds are remitted to the Commission, applicants must file FCC Form 159.

[123] Applicants should submit one paper original and one microfiche original of their application, as well as two microfiche copies.

[124] Several commenters suggested that we consider a "consolidated" short form -- one form that could be used for bidding on multiple licenses. We are currently assessing the feasibility of this option.

[125] If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required.

particular service; and 5) certification that the applicant satisfies any financial qualifications requirements for the service in question. If the applicant seeks to take advantage of any special provisions adopted for designated entities (*see* Section VI, *infra*), the short-form application would also contain a statement to that effect and a declaration under penalty of perjury that the applicant is qualified as a designated entity under the Commission's eligibility rules. For the reasons discussed in Section V, *infra*, the bidder certification will also require bidders to identify all parties with whom they have entered into partnerships, joint ventures, consortium or other agreements, arrangements or understandings of any kind which relate to the licenses being auctioned, including any such agreements relating to the post-auction market structure. In addition, as discussed more fully below, bidders will be required to certify that they have not entered into any agreements, arrangements or understandings of any kind with other bidders (who are not members of identified partnerships, joint ventures or other bidding csortia) regarding the amount of their bid, bidding strategies or the particular licenses on which they will or will not bid. We may also ask applicants to submit additional information purely for informational purposes so that we can compile the report to Congress required by section 309(j)(12)(D)(iv).

167. In the NPRM, we tentatively concluded that short-form applications should be judged by a letter-perfect standard. *See* NPRM at ¶ 100. Several commenters, however, opposed subjecting short-form applications to a letter perfect standard of review, and proposed that the Commission allow a brief period for correcting errors in short-form applications. *See, e.g.*, comments of AT&T at 30-31, BellSouth at 36-37. But *cf.* comments of Comcast at 16, n.25. We now believe, as a general matter, that the public interest would be better served by encouraging maximum bidder participation in auctions. Therefore, we have decided to adopt a more liberal standard in most cases.[126] Applicants whose short-form applications are substantially complete, but contain minor errors or defects, will be provided an opportunity to correct their applications prior to the auction.[127] However, applicants will not be permitted to make any major modifications to their applications, including ownership changes or changes in the identification of parties to bidding consortia. In addition, applications that are not signed or that fail to make the requisite certifications will be dismissed as unacceptable.

168. After reviewing the short-form applications, the Commission will issue a second Public Notice listing all defective applications and notify applicants of the specific defect. Applicants will be given an opportunity to cure defective applications and resubmit a corrected version.[128] After reviewing the corrected applications, the Commission will release a third Public Notice announcing the names of all applicants whose applications have been accepted for filing. Applicants identified in this Public Notice will then be required to submit the full amount of their upfront payment[129] to the Commission's lock-box bank by a date certain, which generally will be no later than 14 days before the scheduled auction. After the Commission receives from its lock-box bank the names of all applicants who have submitted timely upfront payments, the Commission will issue a fourth Public Notice announcing the names of all applicants that have been determined to be qualified to bid.[130] Each applicant listed on this fourth Public Notice will be issued a bidder identification number and further information and instructions regarding the auction procedures. During an auction, bidders will be required to provide their bidder identification numbers when submitting bids.

B. Upfront Payment

169. To ensure that only serious, qualified bidders participate in our auctions, we proposed that all participants in any auction tender in advance to the Commission a substantial sum (an "upfront payment") as a condition of bidding. NPRM at ¶ 102. We proposed that the upfront payment be set using a formula based on the amount of spectrum and population (or "pops") covered by the license or licenses for which parties intend to bid. *Id.* at ¶ 103. We proposed to set the upfront payment at $0.02 per pop per megahertz. *Id.* We reasoned that an upfront payment requirement would ensure the validity of the information generated during auctions and increase the likelihood that licenses are awarded to the qualified bidders who value them the most, thus promoting the rapid deployment of new technology.

170. There is substantial support in the comments for the Commission's proposal to require prospective bidders to make substantial upfront payments prior to auction. *See, e.g.*, comments of Comcast at 18, PacBell at 28, Nextel at 16, and AWCC at 31-32. Though some favor a fixed upfront payment set by the Commission prior to the auction (*see, e.g.*, comments of Edward M. Johnson at 2, and LuxCel Group, Inc. at 8), most support the Commission's proposed $0.02 per pop per MHz formula, which would enable prospective bidders to tailor their upfront payment to their bidding strategies (*see, e.g.*, comments of PacBell at 28, Telocator (now PCIA) at 13, CTIA at 30, and Rochester Telephone Corporation at 13). Commenters suggest that there should be some fixed minimum on the amount of upfront payment made prior to auction (suggestions range from $2,500 to $100,000 for different services). *See, e.g.*, comments of Telocator at 20-21, Cellular Communications, Inc. at 15, AT&T at 34, and BellSouth at 41. Some commenters also favor setting a maximum upfront payment, pointing out that our proposed formula yields very high payments Jin the broadband PCS context. *See, e.g.*, comments of Southwestern Bell at 38-40 (arguing generally

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[126] We may, however, on a service-specific basis decide to employ a letter-perfect standard in appropriate circumstances; any such decision would be noted in the service-specific rules.

[127] The general rules governing submission of fees would, however, apply. *See* 47 C.F.R. § 1.1101 *et seq*. These rules currently provide for dismissal of an application if the application fee is not paid, is insufficient, is in improper form, is returned for insufficient funds or is otherwise not in compliance with our fee rules.

[128] On the date set for submission of corrected applications, applicants that on their own discover minor errors in their applications (*e.g.*, typographical errors, incorrect license designations, etc.) also will be permitted to file corrected applications.

[129] *See* subsection B, *infra*.

[130] An applicant who fails to submit a sufficient upfront payment to qualify it to bid on any license being auctioned will not be identified on this Public Notice as a qualified bidder.

for a maximum deposit of $50 million for all markets), and AT&T at 34 (supporting a maximum upfront payment of $5 million, with a down payment following the auction).

171. We conclude that, in most cases, some form of upfront payment is necessary to deter frivolous or insincere bidding. In determining the amount of upfront payment required, we are balancing the goal of encouraging bidders to submit serious, qualified bids with the desire to simplify the bidding process and minimize implementation costs that will be imposed on bidders. This balancing may yield different results depending on the particular licenses being auctioned, so we have determined that the best approach is to retain the flexibility to determine the amount of upfront payment on an auction-by-auction basis. In this way, we will be able to tailor the upfront payment requirement to the auction design we select and to the characteristics of the licenses being auctioned.[131]

172. As a general rule, however, we will use the formula proposed in the Notice for determining upfront payments: a bidder must submit an upfront payment equal to $0.02 per pop per MHz for the largest combination of MHz-pops the bidder anticipates bidding on in any single round of bidding.[132] Thus, the upfront payment may vary by bidder and will reflect the capabilities of each bidder. We believe that this approach will, in most circumstances, best achieve the Commission's goals in requiring an upfront payment while burdening bidders the least. By the time the upfront payment is due, bidders already will have applied for the licenses on which they may wish to bid, and should know approximately the population they ultimately wish to serve. The upfront payment will define the upper bound of MHz-pops on which a bidder will be permitted to bid in any round, and so should be calculated by bidders to reflect the maximum MHz-pops from any combination of licenses on which they may want to bid in a single round.[133] This formula links upfront payment requirements to the total number of MHz-pops bidders plan to bid on and potentially to win, and relates closely to the Milgrom-Wilson activity rule we described above.[134]

173. Using this formula, bidders will be limited in an auction to bidding on licenses encompassing only the number of pops and MHz that their upfront payment covers. However, it provides a bidder with the flexibility to change its strategy during the auction and to bid on a larger number of smaller licenses or a smaller number of larger licenses, so long as the total MHz-pops combination does not exceed that reflected in the upfront payment. Under the formula, bidders will also avoid having to submit an upfront payment for each license on which they potentially might bid. For example, a bidder wishing to be awarded a 30 MHz broadband PCS license in the Chicago MTA would be required to submit an upfront payment equal to the Chicago MTA population of 8.2 million times 30 MHz times $0.02, or $4.9 million. This would allow such a bidder to bid on either the A or B block license (assuming these licenses are sold at the same auction). If both of these licenses are found to be too expensive, the bidder could alter its strategy and bid on the A or B block licenses in smaller MTAs whose total population is less than or equal to 8.2 million (assuming it has filed applications for these licenses).

174. A bidder may file applications for every license being auctioned, but its actual bidding in any round of an auction will be limited by the amount of its upfront payment. Thus, if licenses covering the nation in a particular service are being auctioned simultaneously, a bidder would not be required to file an upfront payment representing national coverage unless it intends to bid on or hold licenses covering the entire nation.[135] Under this system of upfront payments, bidders will retain greater flexibility and be able to more easily effectuate alternative bidding strategies. We will announce the population covered by each license (which will be based on census figures for the licensed service areas) for the purpose of computing the upfront payment in a Public Notice issued prior to the auction, and bidders will be able to calculate the necessary upfront payment for each license on which they wish to bid at any one time.

175. We believe that using a formula that bases the size of the upfront payment on the amount of spectrum and population on which a bidder is interested in bidding at any one time is a rational way for the Commission to be provided assurance that each bidder is a *bona fide* applicant and that each bid is sincere. The size of the upfront payment will thus directly relate to the size and capabilities

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[131] One commenter, Devsha Corporation, questions the Commission's authority to require upfront payments at all. Comments of Devsha Corporation at 4. However, Devsha provides no serious analysis, legal or otherwise, to support its assertion that the upfront payment requirement may overstep the Commission's statutory authority. Devsha states only that the Commission's justification for such a payment "appears to be premised on revenue maximization, a prohibited concern." *Id.* To the contrary, as we clearly stated in the Notice, the upfront payment requirement was proposed "[t]o ensure that only serious, qualified bidders participate in our auctions." NPRM at ¶ 102. We take this opportunity to reiterate that we will adopt upfront payment rules because we believe they will provide the necessary "assurances" required by Section 309(j)(5) and deter frivolous and insincere bidding by discouraging speculators who may otherwise be tempted to "game" our competitive bidding process. Upfront payments also give force to the bid withdrawal penalty, which also is designed to bolster the integrity of our process.

[132] As discussed *infra*, however, we retain the flexibility to consider using a simpler payment requirement when circumstances warrant.

[133] For example, an entity that is interested in bidding on several 30 MHz PCS licenses with a goal of providing service to a population of at most 50 million should make an upfront payment of $30 million ($.02 x 30 MHz x 50,000,000). That bidder will not be permitted to bid (at any time) in the auction, or be permitted to win, 30 MHz licenses covering more than 50 million pops.

[134] Using the $0.02 per pop per MHz formula is most appropriate when a Milgrom-Wilson type activity rule is employed. A preset fixed upfront payment would do little to simplify the auction process for bidders in that circumstance because the activity rule requires bidders to know the number of MHz-pops that correspond to their bids.

[135] For example, if we were to hold an auction of all broadband PCS licenses simultaneously, a bidder who wishes to be licensed only over some regional area (but who is indifferent as to which region) may retain flexibility in bidding by filing applications for licenses throughout the country but remitting an upfront payment reflecting only the maximum number of MHz-pops it ultimately wishes to serve.

of the licensed facilities, the cost to construct a system, the value of the licensed spectrum and the potential amounts bidders will bid.

176. Upfront payments will also provide the Commission with a source of available funds in the event a penalty must be assessed for bid withdrawal prior to further payments. As discussed in Section III.F. above, we have concluded that the appropriate basic penalty for bid withdrawal is to require that the withdrawing bidder make up any difference between the withdrawn bid and the amount of the winning bid the next time the license is offered by the Commission. (If the high bid is withdrawn after the auction closes, an additional penalty will be assessed.) For such a penalty to ensure sincere bidding, however, it must be collectable; and the proposed upfront payment is one means to this end.

177. Our preferred formula for calculating the upfront payment is rationally related to the bid withdrawal penalty. In its September 1993 Mid-Session Review of the 1994 Budget, the Office of Management and Budget estimated that spectrum auctions would generate $12.6 billion from 1994 through 1998. A 1992 report by the Congressional Budget Office assumed that $2 billion would be raised from competitive bidding in services other than PCS. Thus, the approximate value of 120 MHz of PCS spectrum is placed at $10.6 billion, or 35 cents per pop per MHz. Our $0.02 per pop per MHz formula would yield a deposit for such a license that would equal just under six percent of the estimated value of a winning bid. It is reasonable to assume that if a high bidder withdraws its bid, another bidder would be willing to pay approximately the second highest bid amount. We expect bid increments to be around five percent, so an upfront payment calculated by this formula should insure the Commission against nonpayment of the bid withdrawal penalty.

178. In future Reports and Orders establishing service-specific auction rules, we may determine that the $0.02 per pop per MHz formula is inappropriate because of product market or license characteristics or auction design choice. In some circumstances, we may decide that it is more appropriate instead to set a fixed upfront payment or to eliminate the upfront payment entirely. For example, where we award licenses using a sequential oral-outcry auction design, we may simply require that bidders bring to the auction an upfront payment in a specified amount for each license that they wish to be awarded. Bidders desiring more than one license would be required to bring a multiple of the specified sum and once a bidder had won the number of licenses that corresponded to its upfront payment, it would be precluded from further bidding. Indeed, where single sealed bids are employed, upfront payments may be unnecessary.[136] We therefore reserve the option of revising or waiving the upfront payment in appropriate circumstances.[137] In such cases, we will adopt an alternative upfront payment in service-specific auction rules or in the Public Notice announcing the auction.

179. As a general rule, we will not cap upfront payments because we need to ensure that those bidding on large numbers of licenses have the financial capability to build out those licenses and are bidding in good faith. While the upfront payments for broadband PCS licenses could add up to millions of dollars, it would not be unreasonable to expect prospective bidders to tender such sums given the expected overall value of some of these licenses and the expected financial requirements to construct the systems. However, we reserve the right to institute caps in specific services if we are satisfied that an absolute dollar amount will provide sufficient deterrence against frivolous bidding and pernicious strategic bidding.[138] Whether or not we adhere to our preset formula or institute a cap, it is critical that we ensure that those bidding on large numbers of valuable broadband PCS licenses are financially capable of constructing those systems quickly, less the potential of these services to stimulate economic growth and provide new services be stymied.

180. As many commenters suggested, we believe that setting a minimum upfront payment may be appropriate when use of our preferred formula would result in a payment that would be too small. For some narrowband licenses in sparsely populated areas, for example, the formula could yield a very small upfront payment. Even in a market with a population of one million, for some narrowband licenses, the upfront payment could be as low as $200. We believe that, in most cases, such a low amount is not sufficient to deter the filing of speculative applications which would slow down the provision of service to the public. A minimum payment may be needed to discourage frivolous bidding. A general minimum upfront payment of $2,500, as suggested in the comments, is reasonable. As noted earlier, however, we will retain the flexibility to modify this minimum upfront payment in service-specific auction rules if we find that a different amount would better deter speculative filings.

181. On the issue of when an upfront payment should be tendered, there was substantial support in the comments for requiring tender of upfront payments prior to the auction and for permitting assurance of the ready availability of deposits by bidders. *See, e.g.*, comments of AT&T at 33, Nextel at 16-17, and Cellular Communications, Inc. at 14-16. A few commenters, however, argue that, for applicants with special circumstances (such as designated entities and applicants that are local governmental entities), the Commission should permit prospective bidders merely to display or exhibit their upfront payments or submit "highly confident" letters from financial institutions in lieu of tender. *See* comments of AWCC at 32, Palmer Communications, Inc. at 8, and Duncan, Weinberg, Miller & Pembroke, P.C. at 3. Others favor pre-auction deposits only

[136] In single round sealed bid auctions, the need for upfront payments may be less because there would appear to be little incentive for bidders to engage in frivolous bidding. If a high bidder fails to tender its down payment within the time period allowed, the Commission could simply offer the award to the next highest bidder and impose the basic bid withdrawal penalty on the withdrawing bidder. On the other hand, a series of withdrawals could slow down the process of assigning licenses, and bid withdrawal penalties may not be an adequate deterrent without an upfront payment to ensure they are collectable.

[137] With respect to certain licenses that the Commission may set aside for designated entities (*see* Section VI, *infra*), we may decide that the upfront payment required of applicants should be capped, reduced or set according to a different formula. Any such decision would be made in a Report and Order adopting competitive bidding rules applicable to the specific service.

[138] As discussed at n.137 above, one instance in which we may limit upfront payment requirements would be if we set aside licenses in certain blocks for bidding by designated entities. *See* Section VI, *infra*.

when the Commission cannot verify the amount of liquid assets available to a prospective bidder. *See* comments of Unique Communications Concepts at 6.

182. We have considered the suggestions by some commenters that designated entities be permitted to use letters of credit for upfront payments. *See, e.g.*, comments of Minority PCS Coalition Oat 9, Palmer Communications at 8, and reply comments of TDS at 16, 17. Similarly, Southwestern Bell and US West suggest that bidders be permitted to submit their upfront payments in the form of Treasury bills with a face amount of the required payment. We believe that these methods of submitting upfront payments would impose too great an administrative burden on the Commission, at least until the Commission has more experience with the conduct of auctions.

183. The use of unconditional letters of credit, for example, would require the Commission to read and evaluate each such letter of credit to ensure that it is in fact unconditional; different banks often use different language in their letters of credit, and the Commission does not have the time or the resources to engage in discussions or negotiations with applicants and their banks to remove or clarify any uncertainties associated with such language. Nor do we think it appropriate to prescribe appropriate language for an unconditional letter of credit; the use of letters of credit was not proposed in the notice of proposed rule making, and we are reluctant to prescribe such language without the benefit of public comment. Moreover, letters of credit commonly have dates of expiry, a complication that we do not face with cashier's checks or wire transfers. With letters of credit, an auction that lasts longer than either the Commission or the applicant expected may cause the applicant to become financially disqualified during the course of the auction.

184. Southwestern Bell's proposal to utilize Treasury bills to satisfy the upfront payment requirement introduces similar complications. Depending on the maturity date of the Treasury bill and the state of the market for such instruments, the actual value of the bill on any given day may be more, less, or the same as the face amount. This amount may even change during the conduct of the auction. We are reluctant to introduce such complications into our auction procedures, at least until we have had further experience with them. We would, however, be willing to consider such an alternative in the future.

185. As set forth in ¶ 171, *supra*, we conclude as a general matter that to protect the integrity of the auction process, all applicants should be required to tender their upfront payments to the Commission prior to bidding.[139] We do not believe that allowing auction participants to tender "highly confident" letters provides the Commission with the degree of assurance necessary to ensure that only serious bidders participate in auctions. The same can be said, at least with respect to our preferred simultaneous multiple round auction design, about allowing auction participants merely to exhibit, but not tender, the upfront payment as a condition of bidding. Such proposals would not provide the Commission with a source of funds to satisfy bid withdrawal penalties, and thus would engender too high a risk that the bidder is financially incapable of fulfilling its payment obligations. Furthermore, to require the Commission to ascertain that bidders have available sufficient liquid assets would impose an excessive administrative burden on the Commission. We will, however, retain the flexibility to alter the timing of the upfront payment for specific auctions when appropriate. We may determine that an exhibit procedure would function well in conjunction with oral outcry auctions, though we do not believe that it can be used effectively with other auction designs.

186. We choose not to create a general exception to our upfront payment requirements for designated entity and local government applicants. But *see* Section VI, *infra*. The danger of insincere bidding, which upfront payments are designed to deter, exists to no less a degree with respect to these groups.

187. Commenters generally argued that the Commission should make prompt refunds of the upfront payments of unsuccessful bidders . *See, e.g.*, comments of JMP Telecom Systems, Inc. at 6. We agree. We will hold all upfront payments until after the auction to which they apply, but as soon as possible we will return the upfront payments of bidders that are not auction winners, are not subject to withdrawal or default penalties, and do not wish to bid for licenses that are to be re-auctioned. In some circumstances, it may be appropriate to retain upfront payments until after the winning bidders have tendered their down payments because further rounds of competitive bidding may be held if down payments are not made.[140] Upfront payments made by a winning bidder will be applied to satisfy its down payment obligations (*see* discussion, *infra*).[141]

188. Given the likely magnitude of some upfront payments and the fact that there will be a significant interval between the date that short-form applications are filed and the auction date, we will not require the filing of upfront payments with short-form applications. To do so would place an unreasonable burden upon applicants by requiring them to dedicate funds for a long period of time, especially if the Commission is unable to pay interest on deposits held.[142] Upfront payments therefore will be

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[139] Upfront payments must be made to the Commission's lock-box bank. Upfront payments may be made by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

[140] We will, however, afford unsuccessful bidders who are not subject to bid withdrawal penalties an opportunity to have their upfront payments returned if they wish to withdraw from further bidding.

[141] As explained in subsection C below, a winning bidder will be required to bring its deposits with the Commission up to 20 percent of its winning bids. Thus, a bidder whose upfront payments total 15 percent of the sum of its winning bids will be required to make an additional down payment of only 5 percent of that sum. If, however, a bidder who wins some licenses also defaults on any other license(s), the bid withdrawal penalty discussed below would apply with respect to the defaulted license(s). In such a case, the bidder's upfront payments up to 20 percent of the defaulted high bid(s) will be retained by the Commission, and we will apply to the bidder's down payment obligations on non-defaulted license(s) only such upfront payments that exceed this amount.

[142] In the NPRM, we indicated that the Commission is not currently authorized to establish interest-bearing accounts. NPRM at ¶ 104, n.100. A number of commenters argue that the Commission should take whatever steps are needed to allow it to pay interest on upfront deposits that ultimately will be

required to be made to the Commission by a date certain, which generally will be no later than 14 days before the scheduled auction. This shorter period will allow the Commission sufficient time to process the data concerning the upfront payments and release a Public Notice listing all qualified bidders. The Commission will set forth specific procedures to be followed in the tendering and processing of upfront payments in the Public Notice to be issued announcing procedures for each auction.

C. Payment for Licenses Awarded by Competitive Bidding

189. In the NPRM, we proposed that, to provide further assurance to the Commission that the winning bidder will be able to pay the full amount of its winning bid, the bidder must tender a significant and non-refundable down payment on the license to the Commission over and above its upfront payment before the auction is terminated. NPRM at ¶ 104. We sought comment on when this additional down payment should be due to the Commission and proposed that, if the winning bidder's upfront payments totalled less than 20 percent of the high bid, the bidder would have to pay the difference promptly. Most of the commenters addressing this issue generally support our proposal that winning bidders increase their deposits with the Commission up to an amount equalling 20 percent of their winning bid or bids. *See, e.g.*, comments of BellSouth at 43-44, PageNet at 35-36, and Telocator at 13. Some commenters feel that a 20 percent down payment requirement would be too high. *See* comments of Sprint at 18 (prefers a 10 percent down payment).

190. In determining the appropriate level for the down payment, we are balancing several factors. First, the down payment needs to be sufficiently high to ensure that all licensees have the financial capability to attract capital to rapidly deploy their systems and operate them in an efficient manner. Second, the down payment has to be sufficiently high to discourage default between the auction and licensing and ensure payment of the default penalty if such a default occurs. We believe that the upfront payment is not sufficient to ensure the payment of such a default penalty because the potential penalty is likely to be greater during the period between the close of the auction and licensing than during the auction because there is a greater risk of a drop in license values. It is common practice to require a down payment on the order of 20 percent to protect against default in auctions and other instances where there is the possibility of default.[143] Requiring a significant down payment is especially important in spectrum auctions in light of our goal of promoting economic growth. Default could force re-auctioning of the license and might cause significant delays in service provision, and a significant down payment tends to ensure that winning bidders actually qualify as licensees and can build their systems expeditiously. We are nonetheless aware that holding a down payment keeps funds from being available to the auction winner for other productive endeavors. In addition, setting the down payment too high might hamper access by potential licensees with limited access to capital markets. We conclude that a 20 percent down payment is appropriate to ensure that auction winners have the necessary financial capabilities to complete payment for the license and to pay for the costs of constructing a system and protect against possible default, while at the same time not being so onerous as to hinder growth and diminish access. We therefore will require that winning bidders supplement their upfront payments with a down payment sufficient to bring their total deposits up to 20 percent of their winning bid(s).[144]

191. With regard to the time for tendering the additional deposit, commenters supported everything from immediate tender before the auction closes to a substantial "grace period." *Compare* comments of BellSouth at 44 ("[b]idders should be prepared to meet deposit obligations as soon as they make their bid") and reply comments of PageNet at 11 ("winning bidders should be required to pay the full amount of their bids on auction day") with comments of McCaw at 17-18 (payment schedules should include flexibility that "might include an extended but reasonable period of time"). It was also suggested that the Commission should keep auctions open until full deposits are received, whenever that occurs. *See* comments of AT&T at 35.

192. We have carefully considered the alternative proposals regarding timing of the down payment, and have determined that, to further ensure that bidders are capable of constructing their systems, a down payment of 20 percent of the winning bid generally will be required within five business days after the auction is over.[145] Requiring the down payment prior to closing the auction would facilitate finding a backup bidder if the winning bidder is unwilling or unable to make the down payment. Bidders would be on notice that auction results are not yet final and that bidding on some or all properties could be reopened if some high bidders fail to tender their down payments. We conclude, however, that requiring immediate payment of remaining deposits by auction winners would place an unreasonable burden on the auction process and on bidders, who would not know until the bidding ends exactly what down payment amount will be required of them. We also reject suggestions that we should allow a "flexible" period between auction and payment . Such a procedure could give winning bidders the opportunity to "game" our processes by making an upfront payment, bidding on a license, and then assessing afterwards whether to go for-

returned to unsuccessful bidders. *See, e.g.*, comments of Mercury Communications, L.C. at 2, LuxCel Group, Inc. at 8, Pacific Telecom Cellular, Inc. at 6. We are sympathetic to these views, and we are attempting to obtain the necessary authorization that will permit the payment of interest on upfront payments and deposits.

[143] A 20 percent down payment is required by the U.S. Department of the Interior for bids on offshore oil and gas leases. New Zealand requires a 25 percent deposit be submitted with bids for spectrum licenses. The RTC required only a 10 percent payment within 24 hours of its auction, but required full payment within 7 days of the auction. Lenders frequently require private mortgage insurance when down payments are less than 20 percent.

[144] Thus, if the upfront payment already tendered by a winning bidder, after applying any bid withdrawal penalties, amounts to 20 percent or more of its winning bids, no additional deposit will be required.

[145] As discussed in Section VI.C., *infra*, an auction winner that is a designated entity entitled to make payments through an installment plan will be required to bring its deposits with the Commission up to only 10 percent of its winning bid after the bidding closes. Such an entity will pay an additional 10 percent of its winning bid to the Commission after a license is granted.

ward with the award of the license. Furthermore, a substantial delay between auction and down payment would subvert our objective of reducing speculative bidding because it would provide financially unqualified bidders with an opportunity to "shop" a winning bid in an effort to obtain financing for a down payment. This would undermine the integrity of the auction itself. We therefore will require that a high bidder submit the required down payment by cashier's check or wire transfer to our lock-box bank by a specified date, generally within five (5) business days following the close of bidding.

193. In the NPRM, we tentatively concluded that the Commission should not allow licensees to satisfy their payment obligations to the Commission through the payment of royalties.[146] Nothing in the comments has convinced us to change this conclusion. Royalties, if based on a firm's revenues, would function as a tax and tend to reduce output. Further, a royalty program would require us to adopt complex accounting rules for identifying the share of a firm's revenues that is attributable to a particular license. We continue to believe that this would be extremely intrusive and difficult to implement. Indeed, considering the degree of regulatory oversight that this agency exercises over its licensees, a royalty program that makes government revenues dependent on the success of a regulated service may give rise to potential conflicts. We therefore will not allow licensees to satisfy their auction payment obligations through the payment of royalties.

194. In the NPRM, we proposed to require all auction winners, except those with respect to which we have given special consideration pursuant to Section 309(j)(4), to make full payment of their winning bids by a lump sum. NPRM at ¶ 68. The comments generally supported this proposal. *See, e.g.,* comments of AT&T at 36, Richard L. Vega Group at 4. We continue to believe that, except with respect to those designated entities to which we decide to give special consideration pursuant to Section 309(j)(4) (*see* Section VI, *infra),* full payment of the remainder of the winning bid in a lump sum is the best course of action.[147] This will leave financing to the private sector and eliminate the need for the Commission to conduct detailed credit checks. In addition, it will allow us to confer the benefit of paying by installments to eligible designated entities, in accordance with the wishes of Congress. Accordingly, unless otherwise specified by the Commission, auction winners will be required to make full payment of the balance of their winning bids within five (5) business days following award of the license. Grant of the license will be conditioned on this payment.

D. Default and Disqualification

195. In the Notice, we sought comment on the Commission's authority to retain upfront payments and down payments in the event that an auction winner subsequently is found ineligible or unqualified or does not pay the balance of its bid at the appropriate time. NPRM at ¶ 109. We noted that Section 309(j)(4)(B) specifically directs the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures ... to promote investment in and rapid deployment of new technologies and services."[148] We tentatively concluded that some strong incentives must be in place to deter frivolous bids or unqualified bidders that could leave the Commission without an auction winner that is qualified and eligible to receive a license. NPRM at ¶ 109.

196. There was substantial support in the comments for the notion that the Commission is authorized to and should order forfeiture of upfront and down payments if the auction winner later defaults or is disqualified. *See, e.g.,* comments of CTIA at 29-30, AT&T at 35, n.43, PageNet at 35-36, Cook Inlet at 47, and BellSouth at 42-44. A few commenters suggested, however, that retention of deposits in the event of disqualification would be "draconian." Comments of the Association of Independent Designated Entities at 7, n.7 . *See also* comments of Richard L. Vega Group at 9-10.

197. As we discussed in Section III.F. above, it is critically important to the success of our system of competitive bidding that potential bidders understand that there will be a substantial penalty assessed if they withdraw a high bid, are found not to be qualified to hold licenses or default on a balance due. We therefore are adopting penalties to be assessed in the event of default or disqualification. These penalties will provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction.[149] We believe, however, that requiring the forfeiture of all funds on deposit with the Commission could, in some cases, be too severe a penalty. In order to carry out spectrum auctions successfully, the penalty for default or disqualification should be rationally related to the harm caused, yet be set high enough to deter unwanted conduct. Accordingly, we will require any auction winner who defaults by failing to remit the required down payment within the prescribed time to reimburse the Commission in the amount of the difference between its high bid and the amount of the winning bid the next time the license is offered by the Commission. In addition, a defaulting auction winner will

[146] The Commission noted that royalties are used by the Department of the Interior for outer continental shelf oil and gas leases. NPRM at ¶ 70.

[147] There was some opposition to lump sum payments. *See* comments of Sprint at 16-17, and Rochester Telephone Corporation at 13-14. These commenters would prefer that the Commission allow all winning bidders to pay for their licenses on an installment schedule, and argue that such a result would allow licensees to focus more of their resources on deploying new services. While we are sensitive to these considerations, we believe that a lump sum payment requirement is necessary to avoid speculative bidding. Furthermore, affording installment payment schedules to all winning bidders would tend to undercut our policies with respect to eligible designated entities. *See* Section VI.C., *infra.*

[148] *See also* H. R. Rep. No. 103-111 at 257 (Commission authorized to impose payments to prevent unjust enrichment from trafficking; House Committee on the Budget anticipates Commission will use this authority to deter participation in licensing process by those who have no intention of offering service to the public).

[149] In connection with the sale of government property, it is customary for the government to provide such incentives by retaining down payment monies rendered. Both the Federal Deposit Insurance Corporation and the Resolution Trust Company retain a bidder's down payment if a bidder is unable to close on a property it ostensibly purchased at auction.

be assessed a penalty of three percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the three percent penalty will be calculated based on the defaulting bidder's bid amount. The three percent additional penalty will encourage bidders, if they are to withdraw their bids, to do so before bidding ceases. This additional penalty will also apply if an auction winner is disqualified or fails to remit the balance of its winning bid after having made the required down payment. We will hold deposits made by defaulting or disqualified auction winners to help ensure that the penalty is paid. (During the period that deposits are held pending ultimate award of the license, any interest that accrues on deposits will be retained by the government.)

198. We believe that these penalties will adequately discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements. We further believe that this approach is well within our authority under both Section 309(j)(4)(B) and Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), as it is clearly necessary to carry out the rapid deployment of new technologies through the use of auctions. In addition, if a default or disqualification involves gross misconduct, misrepresentation or bad faith by an applicant, the Commission also may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it may deem necessary, including institution of proceedings to revoke any existing licenses held by the applicant.[150]

199. If the high bidder makes the down payment in a timely manner, a long-form application[151] will be required to be filed by a specified date, generally within ten (10) business days after the close of the auction.[152] After the Commission receives the high bidder's down payment and the long-form application, we will review the long-form application to determine if it is acceptable for filing. Upon acceptance for filing of the long-form application, the Commission will release a Public Notice announcing this fact, triggering the filing window for petitions to deny. If, pursuant to Section 309(d), the Commission denies or dismisses all petitions to deny (if any are filed), and is otherwise satisfied that the applicant is qualified, the license(s) will be granted to the auction winner.

200. With regard to petitions to deny, we will adopt expedited procedures consistent with the provisions of section 309(i)(2) to resolve substantial and material issues of fact concerning qualifications.[153] This provision requires us to entertain petitions to deny the application of the auction winner if petitions to deny are otherwise provided for under the Communications Act or our Rules. *See* Section 309(b), (d)(1). We solicited comment on two possible schedules for entertaining petitions to deny in cases where such petitions are required: 1) eliciting petitions with respect to all applications prior to the auction; and 2) placing only the auction winner's application on Public Notice for 30 days following the auction.

201. To the extent that they addressed this issue, commenters generally agreed that only the auction winner's application should be subject to petitions to deny. *See* comments of AT&T at 40-42, Arch Communications at 18-19, Cellular Service, Inc. at 16. This is the procedure that the Commission has used in connection with lotteries among mutually exclusive cellular applications. *See* Sections 1.823 and 22.30 of the Commission's Rules. Interested parties could then file petitions and the auction winner would have an opportunity to reply.

202. We affirm our tentative conclusion that the Commission need not conduct a hearing before denial if it determines that an applicant is not qualified and no substantial issue of fact exists concerning that determination. In the event that the Commission identifies substantial and material issues of fact in need of resolution, Sections 309(j)(5) and (i)(2) of the Communications Act permit in any hearing the submission of all or part of evidence in written form and allows employees other than administrative law judges to preside at the taking of written evidence.[154] We will incorporate these principles into our general procedural rules with respect to licenses subject to competitive bidding.

203. In the event that an auction winner defaults on its final payment or is otherwise disqualified, an issue arises as to whether the Commission should hold a new auction or simply offer the license to the second-highest bidder. Parties commenting on this issue generally favored re-auctioning the license, pointing out that changing market and even technological developments since the initial auction may change the identity of the high bidder and the value of the license, especially if the intervening period is relatively long. *See, e.g.*, comments of BellSouth at 37. They urge that any re-auction be open to new bidders, arguing that such a procedure would reduce the incentive of losing bidders to "gang up" on the auction winner. *See* comments of Utilities Telecommunications Council at 21.

204. We believe that, as a general rule, when an auction winner defaults on its final payment or is otherwise disqualified after having made the required down payment, the best course of action would be to re-auction the license. Although this may cause a brief delay in the initiation of service to the public, the passage of time between the original auction and the disqualification may have seen circumstances change so significantly as to alter the value of the license and the identity of the high bidder. One of our primary concerns is that licenses be awarded to the parties that value them most highly, and in this situation this can best be assured though a re-auction. Nevertheless, if a default occurs within five (5) business days after the end of bidding, the Commission retains the right to offer

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[150] *See, e.g., Character Qualifications Policy Statement*, 102 FCC 2d 1179 (1986).

[151] The application form to be filed will vary depending on the service and would be specified in the rules specifically applicable to that service.

[152] Ordinarily, failure by a high bidder to file the required long-form application in a timely manner will be deemed a default and subject it to default penalties. The Commission may, for good cause, determine that a late-filed long-form application should be accepted.

[153] *See* 47 U.S.C § 309(j)(5).

[154] Among the procedural models on which we solicited comment are those for mutually exclusive cellular applications in the top 30 markets (*see* 47 C.F.R. § 22.916(b)) and those for certain lotteries (*see* 47 C.F.R. § 1.822(b)).

the license to the second highest bidder at its final bid level, or if that bidder declines the offer, to offer the license to other bidders at their final bid levels.

205. If a new auction becomes necessary because of disqualification or a default more than 5 business days after the end of bidding, we will afford new parties an opportunity to file applications. The passage of time and intervening events between an auction and a disqualification may have affected the market for the license to be auctioned and created new interest in the license. In addition, the applicants in the first auction may, for any number of reasons, no longer be interested in obtaining the license. One of our primary goals in conducting auctions is to assure that serious interested bidders are in the pool of qualified bidders at any re-auction. We believe that achievement of this goal outweighs the short delay that we recognize may result from allowing new applications in a re-auction. Indeed, if we were not to allow new applicants in a re-auction, interested parties may be forced into an after-market transaction to obtain the license, which would itself delay service to the public and deny recovery by the government of a reasonable portion of the value of the spectrum.

E. Minimum Bids and Reservation Prices

206. In the NPRM, we briefly discussed whether to set a reservation price below which the license would not be awarded. The reservation price could be disclosed, in which case it would effectively constitute a minimum bid, or it could be undisclosed. In the latter case, if no bidder exceeded the reservation price, the license would not be awarded. We pointed out that the benefits of a reservation price are likely to be greatest when there are few bidders, for when competition for licenses is intense the benefits of setting a reservation price might not be worth the cost, and tentatively concluded that there should be no minimum bid. NPRM at ¶ 67.

.207. The comments generally oppose minimum bids. *See, e.g.*, comments of AT&T at 38-42, Telocator at 4-5, and the Alliance for Fair and Viable Opportunity at 10. These commenters argued that the ultimate service provider and not the Commission should establish the value of a license and that minimum bids could artificially limit the participation of potential service providers by imposing arbitrary regulatory requirements. *See also* comments of U.S. Intelco Networks at 12. While we generally agree with these arguments, we have decided that the Commission should retain the flexibility to utilize reservation prices if it decides that they are appropriate in a particular auction. Without knowing how many bidders are likely to bid in a particular auction, the type of license to be auctioned or the type of auction to be used, it is impossible to generalize about the desirability of using reservation prices. If, for example, the Commission had accepted many applications to bid on a particular license that was scheduled to be auctioned in an oral sequential auction, establishing a reservation price likely would be superfluous. If, however, only two or three applicants had applied to bid for a valuable license, the Commission might set a reservation price in order to prevent that license from being sold under circumstances where there would be little competition among bidders and significant incentives to collude.[155] Accordingly, our rules will permit the Commission to adopt a reservation price in such circumstances.

F. Procedures in Other Auction Designs

208. The above described procedures may vary somewhat depending upon the auction methods used. For example, where sealed bidding is used, in addition to the information specified above, the initial Public Notice may specify the date on which sealed bids must be submitted. In single round sealed bid auctions, we may decide to alter the upfront payment schedule or amount or waive the upfront payment requirement.[156] The need for an upfront payment in this auction design setting will be balanced against the administrative cost of processing upfront payments and returning payments to unsuccessful bidders. There may be auctions for licenses wherein the costs of requiring upfront payments outweigh the benefits. We may simply require bidders to submit the required down payment with its bid. In single round sealed bid auctions, we will usually require that bids be received on a date specified in the Public Notice and that bids clearly indicate the bidder's identification number and the auction and license to which it relates. After bids are submitted and evaluated, the Commission would issue a second Public Notice indicating all bidders who have made timely bid submissions. After release of the second Public Notice, the Commission would notify the high bidder. If the high bidder fails to submit a timely down payment, the next highest bidder normally would be notified and offered an opportunity to tender the down payment.

209. Where oral outcry bidding is employed, the general procedures described above will be followed, with one possible exception. As discussed above, we may determine that an exhibit procedure for upfront payments may be suitable for oral outcry auctions. Qualified bidders will be required to bring a cashier's check for the full amount of their upfront payment to the auction site. Bidders will be required to present their upfront payment check as a condition of being issued a bidder identification number and admittance to the bidder section of the auction site. After bidding closes on a particular license, the high bidder will be required to tender its upfront payment and sign a bid confirmation form. If the high bidder declines to tender the upfront payment and/or refuses to sign the bid confirmation form, the license would be immediately re-auctioned.[157]

V. REGULATORY SAFEGUARDS

210. The Budget Act directs the Commission to "require such transfer disclosures and anti-trafficking restrictions and payment schedules as may be necessary to prevent unjust enrichment as a result of the methods employed to issue licenses and permits." 47 U.S.C. § 309(j)(4)(E). In

[155] The employment of a reservation price also might aid in reducing unjust enrichment. Thus, in circumstances where unjust enrichment might be more likely to occur, the Commission may determine that a reservation price is necessary.

[156] *See* ¶ 157, *supra*, for discussion of the bid withdrawal, default and disqualification penalties that would apply in single round sealed bidding.

[157] *See* ¶ 156, *supra*, for discussion of the bid withdrawal, default and disqualification penalties that would apply in oral outcry bidding.

this section of the Second Report and Order, the Commission adopts safeguards designed to ensure that the requirements of Section 309(j)(4)(E) are satisfied. In the Notice, we discussed three types of safeguards for the auction process. Two of them -- measures to prevent "unjust enrichment" and performance requirements -- are expressly addressed by the statute. The third -- rules prohibiting collusion among bidders -- was one that we raised on our own motion. We proposed these safeguards to ensure prompt delivery of services (including to rural areas), rapid deployment of new services and technonlogies, development of competitive markets, and wide access to a variety of services.

A. Unjust Enrichment and Transfer Disclosure Requirements

211. The House Report suggests that, while the Commission should keep track of all transfers of licenses issued via auctions, unjust enrichment is likely to be a problem only in auctions where special accommodations are provided to designated entities.[158] In an open bidding process without special accommodations, the winner is likely to pay the market price for its license. Hence resale would not involve any unjust enrichment. In the Notice, we indicated that prohibitions on license transfers, even if for a limited period of time, were likely to have the unintended effect of delaying service to the public contrary to the purpose of the statute. *See* NPRM at ¶ 84. Therefore, while we sought comment on transfer restrictions, we also requested comment on establishing a system of financial discincentives to prevent sellers from obtaining any windfall profit from premature transfer of a license.[159]

212. The legislative history suggests that in the auction context Congress's directive to take steps to prevent unjust enrichment was similarly intended to prevent auction winners from acquiring licenses for less than true market value at auction[160] and then transferring them for a large profit prior to providing service. Such post-auction changes in ownership have the potential to delay buildout and thereby delay the provision of service to the public. The acquisition of a license through an effectively conducted competitive bidding process is in itself a strong deterrent to unjust enrichment. As we explained in the NPRM at ¶ 83, "in an unlimited bidding process, the winner is likely to pay the market price for its license. Hence resale would not involve any unjust enrichment." *Accord* , comments of Nextel at 8, Time Warner at 20. We noted Congress's observation in the legislative history that unjust enrichment was likely to be a problem only where participation is limited in order to ensure designated entities' opportunity to participate. Thus, we proposed transfer restrictions on licenses won by designated entities that receive special treatment and financial disincentives on the transfer of designated entity licenses as possible ways to ensure against unjust enrichment.

213. The comments were divided on the subject of imposing transfer restrictions to prevent unjust enrichment. *See, e.g.,* comments of BellSouth at 30-32, reply comments of Nextel at 9, reply comments of American Personal Communications at 6, but *cf.* reply comments of American Wireless Communications Corporation at 12. Those supporting transfer restrictions argue that such restrictions are particularly appropriate in the context of licenses which are won by designated entities, *see* comments of AT&T at 27-29, or only appropriate in that context, *see* comments of McCaw at 22 and Palmer Communications at 7-8. Those opposing transfer restrictions argue that the auction process itself or construction requirements or both will deter speculation and obviate the need for further safeguards such as transfer restrictions. *See* comments of Arch Communications at 16-18 and Windsong Communications at 5.

214. As discussed below in Section VI, we have adopted specific rules governing unjust enrichment by designated entities. In addition, given the lack of previous experience with the competitive bidding process, we believe that it is important to monitor transfers of licenses awarded by competitive bidding in order to accumulate the data necessary to evaluate our auction designs and judge whether "licenses [have been] issued for bids that fall short of the true market value of the license," H.R. Rep. No. 103-111 at 257. Therefore, we will impose a transfer disclosure requirement on licenses obtained through the competitive bidding process, whether by a designated entity or not. We will give particular scrutiny to auction winners who have not yet begun commercial service and who seek approval for a transfer of control or assignment of their licenses within three years after the initial license grant, in order to determine if any unforseen problems relating to unjust enrichment have arisen outside the designated entity context.

215. As in the First Report and Order, the applicant will be required to file, together with its application, the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration received in return for the transfer of its license. The information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (*e.g.,* management or consulting contracts either with or without an option to purchase; below

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[158] The House Report notes that "[I]n a system of open competitive bidding, trafficking in licenses should be minimal, since the winning bidder would have paid a market price for the license. Nevertheless, the Committee anticipates that the Commission will monitor trafficking in licenses issued pursuant to the provisions of section 309(j), and will impose any necessary regulations and transfer fees as may be necessary to prevent unjust enrichment. In the event that the Commission limits participation in any given competitive bidding procedure, however, there exists a significant possibility that licenses will be issued for bids that fall short of the true market value of the license. To the extent that the Commission is attempting to achieve a justifiable social policy goal--such as the reservation of appropriate licenses for small business applicants--licensees should not be permitted to frustrate that goal by selling their license in the aftermarket. In these instances, antitrafficking restrictions are necessary and appropriate." H. R. Rep. No. 103-111 at 257.

[159] In response to a Congressional directive, our First Report and Order in this proceeding addressed the subject of unjust enrichment with respect to licenses issued by lottery in the future. We observed that Congress's concerns of unjust enrichment appeared to stem from transactions where the licensee obtains a license at nominal cost in a lottery and then sells it for a large profit prior to providing service to the public. *See* First Report and Order at § 4.

[160] *See* H. R. Rep. No. 103-111 at 257, expressing concerns over the possibility that "licenses will be issued for bids that fall short of the true market value of the license."

market financing).[161] We believe that these requirements will have minimal negative impact on competition. As we noted in the First Report and Order, transfer disclosure requirements should not be a burden on licensees inasmuch as the documents to be submitted to the Commission will be prepared for other purposes in any event. Any competitive concerns raised by the possible disclosure of sensitive information contained in purchase agreements or similar documents can be addressed by the provisions in Sections 0.457 and 0.459 of our Rules providing for the nondisclosure of information. 47 C.F.R. §§ 0.457, 0.459. The reporting requirements will also enable us to monitor more closely than we now can the degree to which we are complying with Congress's directive in Section 309(j)(3)(B) to ensure that "new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants . . . ." *See also* Section 309(j)(12) (1997 Report to Congress).

B. Performance Requirements

216. In the NPRM, we noted that the Budget Act required the Commission to "include performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure prompt delivery of service to rural areas, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services."[162] The House Report provided a specific example of the warehousing concern, suggesting that "an incumbent service provider could submit a bid for a license in a service that would compete with an existing business, and engage in behavior that would prevent competition from occurring. This would deny the public both the benefit of having access to the new service, and the benefits of competition.[163] We therefore sought comment on the likely extent of warehousing of spectrum, the circumstances, if any, in which warehousing was likely to occur, and whether the Commission must impose performance requirements for all licenses awarded by auction.

217. We also asked whether there were circumstances in which the likelihood of warehousing was sufficiently low that requirements were unnecessary or whether other methods, such as restricting ownership of licenses to non-incumbents, would ensure performance. Finally, we noted that for many services, our rules already include performance requirements and asked to what extent existing requirements might or might not be sufficient to ensure performance. Finally, we asked whether existing performance requirements might be relaxed for licenses to be auctioned.

218. The comments were widely divided on the question of performance requirements. Some commenters argued against performance requirements generally (although not auction financial qualification requirements). *See* comments of PageNet at 28. Other commenters argued that existing performance benchmarks should be retained. *See* comments of Quentin L. Breen at 5. Still others argued that additional and more stringent performance requirements were required (*see* comments of Cellular Service, Inc. at 13), that the Commission should place restrictions on competing delivery services rather than imposing performance requirements (*see* comments of Comtech Associates, Inc. at 3 and of Suite 12 Group at 13), that performance requirements were only necessary in the case of licenses for which bidding was restricted (*see* comments of McCaw at 12), or that performance requirements should not be applied to rural telephone companies (*see* comments of the Rocky Mountain Telecommunications Association at 23).

219. We believe that it is unnecessary and undesirable to impose additional performance requirements on all auctionable services. As several commenters recognized (*see* comments of BellSouth at 33-34), the service rules for most existing services, including the new broadband and narrowband PCS services, already contain performance requirements, such as the requirement to construct within a specified period of time. *See, e.g.* , 47 C.F.R. § 99.103 and 99.206 (Narrowband and Broadband PCS); 47 C.F.R. § 95.833 (IVDS) and 47 C.F.R. § 90.155 (Private Land Mobile Radio Service). We do not believe that perfomance requirements in addition to those already provided in the service rules are necessary to address Congress's concern regarding "warehousing" of spectrum. We believe that it is more appropriate to address specific warehousing concerns on a service specific basis tailoring the requirements to the circumstances at issue. For example, in certain private radio services, an applicant may not acquire additional frequencies within 40 miles of existing frequencies unless the existing frequencies are fully utilized. *See* 47 C.F.R. §§ 90.623 and 90.627. We believe that existing performance requirements, in conjunction with the requirement that licensees pay for spectrum use, should be adequate to prevent the warehousing of spectrum and ensure fair competition and the prompt delivery of service.[164]

220. With respect to the few services where no performance requirements currently exist, however, we will prescribe such performance rules as are necessary at the same time we promulgate competitive bidding rules for each of those services in subsequent Reports and Orders. This service-specific approach should promote investment and economic growth by tailoring performance requirements to the specific characteristics of individual services.

C. Rules Prohibiting Collusion

221. The Notice requested comment on whether the Commission should adopt special rules prohibiting collusive conduct in the context of competitive bidding. We indicated that such rules would serve the objectives of the Act by preventing parties, especially the largest firms, from agreeing in advance to bidding strategies that divide the market according to their strategic interests and disadvantage other bidders. We also noted that such rules could strengthen confidence in the oral bidding process and help ensure that the government receives a fair market price for the use of the spectrum. However, we also recognized that if anticollusion rules are too strict or are not sufficiently

[161] A requirement of this type was proposed in the comments of the California Public Utilities Commission at 4. We imposed a similar requirement in the First Report and Order in this proceeding with respect to transfers of licenses obtained through lotteries.

[162] *See* Section 309(j)(4)(B) of the Communications Act, as amended.

[163] *Id.* at 256.

[164] *Accord*, comments of Time Warner Telecommunications.

clear, they could prevent the formation of efficiency enhancing bidding consortia that pool capital and expertise and reduce entry barriers for small firms and other entities who might not otherwise be able to compete in the auction process.

222. Many commenters indicated that specific Commission rules prohibiting collusion were unnecessary because existing antitrust laws are sufficient to deter most forms of collusive behavior. *See, e.g.*, comments of PacTel at 30, PacBell at 29, Sprint at 19, and Telocator at 5. These commenters also indicated that collusion was unlikely in the context of spectrum auctions because the large number of bidders and the use of sealed bidding generally would undermine the effectiveness of collusive agreements. *See, e.g.*, comments of PacTel at 29, and AT&T at 39. However, several commenters argued that the Commission should adopt specific rules prohibiting collusion in order to preserve the integrity and competitiveness of the auction process. *See, e.g.*, comments of TDS at 18. These commenters favored adoption of specific rules prohibiting bidders from collaborating or otherwise discussing any information regarding the substance of their bids or bidding strategies prior to the completion of competitive bidding. In addition, some commenters recommended requiring successful bidders to file disclosure statements indicating all parties with whom they have entered into implicit or explicit arrangements relating to the competitive bidding process. *See* comments of UTC at 18, and Richard Myers at 7. Other commenters recommended that all bidders should be required to certify on their short form applications that they have not entered into any agreements or engaged in any conduct in violation of the Commission's rules or any applicable antitrust or criminal laws in preparing their bids and bidding strategies. *See* comments of TDS at 19, PacTel Paging at 29, Arch Communications at 18, and Sprint at 19. 223. Although the statute does not require special rules to prohibit collusion, the Commission is concerned that collusive conduct by bidders prior to or during the auction process could undermine the competitiveness of the bidding process and prevent the formation of a competitive post-auction market structure. While we generally agree that in most cases the number of bidders and the auction design method we select will effectively deter collusion, we believe that additional safeguards may still be necessary to ensure that collusion does not jeopardize the competitiveness of the auction process. At the same time, however, we seek to ensure that these additional safeguards do not inhibit the formation of legitimate efficiency enhancing bidding consortia, which reduce entry barriers for smaller firms, and improve their ability to compete in the auction process and in the provision of service.

224. As an initial matter, we believe that certain safeguards we have adopted in other sections of this Report and Order will reduce the opportunity for collusion. For example, we have attempted to design competitive bidding methodologies that will create an active bidder market by reducing entry barriers and encouraging all qualified bidders to participate in the auction process. As we indicated *supra* at ¶ 158, we have also decided to withhold bidder identities during the competitive bidding process. This safeguard should help to deter anticompetitive conduct by impeding bidders' efforts to uncover the bidding strategies of their competitors. Moreover, where bidders are unable to identify the parties against whom they are bidding, it will be more difficult for those attempting to collude to ensure that their anticompetitive agreements are honored. This is true because the success of most collusive agreements is dependent upon a system of identifying and punishing defectors. Where bidder identities are withheld during the competitive bidding process, the ability of those attempting to collude to enforce prior agreements by punishing defectors will be frustrated. In addition, as discussed *supra* at ¶ 207, the Commission may establish a minimum bid or reservation price where appropriate to ensure that a fair value is received for a particular license or group of licenses or to reduce the likelihood of unjust enrichment. While we anticipate that in most cases setting a minimum bid price will be unnecessary, where bidding is expected to be less intense and thus the opportunity for collusion greater, the Commission may wish to establish a minimum bid price to ensure that the public receives a fair price for the use of the spectrum.

225. While we intend to rely primarily on these safeguards and existing antitrust laws[165] to prevent collusion in the competitive bidding process, we believe that the competitiveness of the auction process and of the post-auction market structure will be enhanced by certain additional safeguards designed to reinforce existing laws and facilitate detection of collusive conduct. Accordingly, bidders will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the competitive bidding process. Bidders will also be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular properties on which they will or will not bid. Winning bidders will be required to attach as an exhibit to the long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding. All such arrangements must have been entered into prior to the filing of short-form applications. After such applications are filed and prior to the time that the winning bidder has made its required down payment, all bidders will be prohibited from coop-

[165] Agreements between two or more actual or potential competitors to submit collusive, non-competitive or rigged bids are per se violations of the Section One of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. *See, e.g., United States v. MMR Corporation (LA)*, 907 F.2d 489 (5th Cir.1990); *United States v. W.F. Brinkley & Sons Construction Co.*, 783 F.2d 1157 (4th Cir. 1986); *United States v. Finis P. Renest, Inc.*, 509 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 874. Similarly, agreements between actual or potential competitors to divide or allocate territories horizontally in order to minimize competition are *per se* violations of the Sherman Act (*United States v. Topco*, 405 U.S. 596 (1972); *Affiliated Capital Corporation v. City of Houston*, 700 F. 2d 226, 236), and such agreements are anticompetitive regardless of whether the parties split a market in which they both do business or whether they merely reserve one market for one and another for the other. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990).

erating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application. We believe that these requirements are not unduly burdensome and are appropriate to deter bidders from engaging in anticompetitive behavior. These measures will also facilitate the identification and investigation of any suspect bidding behavior.

226. Where specific instances of collusion in the competitive bidding process are alleged during the petition to deny process, the Commission may conduct an investigation or refer such complaints to the United States Department of Justice for investigation. Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with participation in the auction process may be subject to forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions.

VI. TREATMENT OF DESIGNATED ENTITIES

A. Introduction

227. Several provisions of the statute concern participation in the competitive bidding process and in the provision of spectrum-based services by small businesses, rural telephone companies, and businesses owned by women and minorities (sometimes referred to collectively as "designated entities"). The principal provision at issue, Section 309(j)(4)(D) of the Act, relates to designated entities' participation in the provision of spectrum-based services and provides that, in prescribing competitive bidding regulations, the Commission shall, *inter alia*,

> ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures . . .

47 U.S.C. § 309(j)(4)(D). Another provision, section 309(j)(3)(B), provides that in establishing eligibility criteria and bidding methodologies the Commission shall seek to promote the objectives of "economic opportunity and competition and ensur[e] that new and innovative technologies are readily daccessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." To promote these objectives, section 309(j)(4)(A) expressly states that the Commission is required "to consider . . . alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, with or without royalty payments, or other schedules or methods."[166]

228. In the Notice we requested comment on several mechanisms the Commission might employ to implement these provisions, particularly section 309(j)(4)(D). NPRM at ¶ ¶ 72-81. We asked for specific comment on constitutional issues that may arise when preferential measures are limited to minorities and women and whether different approaches would be appropriate to address the specific concerns applicable to each enumerated entity. We also sought comment on how we should define the eligibility criteria for entities designated by the statute -- small businesses, rural telephone companies, and businesses owned by members of minority groups and women. In addition, commenters were asked to address several specific measures that could apply to designated entities, including installment payments, tax certificates, set-aside spectrum for PCS, financial certification procedures, bidding credits, royalties, and distress sales.[167] Finally, the Notice asked for comment on how the Commission could achieve the objectives of the other provisions related to small businesses, rural telephone companies, and businesses owned by members of minority groups and women.

B. Overview and Objectives

229. As discussed in more detail below, we are adopting general procedures that are designed to ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in both the competitive bidding process and in the provision of spectrum-based services. Specifically, we may allow small businesses (including those owned by women and minorities and rural telephone companies) that are winning bidders for certain blocks of spectrum to pay in installments over the term of their licenses. Rural telephone companies may also be eligible for bidding credits for licenses obtained in their service areas if they make an additional infrastructure build-out commitment beyond any existing performance requirements. Bidding credits may be available to other designated entities on certain frequency blocks. Finally, we may establish set-aside spectrum in certain services, in which eligibility to bid may be limited to some or all designated entities. Based on the eligibility criteria established below, some designated entities may qualify for a combination of these available preferences (*e.g.*, eligible small entities bidding for set-aside spectrum might also be allowed installment payments). We will decide whether and

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[166] *See also* 47 U.S.C. § 309(j)(4)(C)(ii), requiring the Commission, when prescribing area designations and bandwidth assignments, to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women; section 309(j)(3)(A), establishing the objective to promote "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays"; section 309(j)(12)(D)(iv), requiring that the Commission's 1997 report to Congress evaluate, *inter alia*, whether and to what extent "small businesses, rural telephone companies, and businesses owned by members of minority groups and women were able to participate successfully in the competitive bidding process."

[167] *See* NPRM at ¶ ¶ 79-81; *id.* at nn.60-65, seeking comment on proposals in the report: *FCC Small Business Advisory Committee to the Federal Communications Commission Regarding Gen. Docket 90-314*, September 15, 1993 ("SBAC Report").

how to use these preferences, or others, when we develop specific competitive bidding rules in particular services in subsequent Reports and Orders.

230. These measures will implement the congressional mandates that we promote the dissemination of licenses among a wide variety of applicants, 47 U.S.C. § 309(j)(3)(B), and that we ensure that small businesses, rural telephone companies and businesses owned by minorities and women have the opportunity to participate in spectrum-based services, 47 U.S.C. § 309(j)(4)(D). Specifically, the preferences will allow designated entities to overcome barriers that have impeded these groups' participation in the telecommunications arena, including barriers related to access to capital. They will enable the participation of a variety of entrepreneurs in the provision of wireless services and the resulting diversity of service offerings will increase customer choice and promote competition. These procedures will also promote economic opportunity by facilitating the licensing of small businesses, rural telephone companies and businesses owned by members of minority groups and women. Moreover, this program will lead to the development and rapid deployment of new services by entrepreneurs who have traditionally lacked access to the telecommunicaitons marketplace. This enhanced access will benefit the public, including businesses and residents in rural areas, and will promote economic growth. Finally, as explained below, we institute a set of safeguards and eligibility criteria that will prevent abuses of the preference system which could undermine the statutory objectives.

C. Specific Preferences

1. Installment Payments

231. In the Notice we proposed to require full payment in a lump sum for all winning bidders, except designated entities.[168] We noted that allowing installment payments is equivalent to the government's extending credit to the successful bidder. This would reduce the amount of private financing needed by a prospective licensee. We requested comment on which applicants should be eligible for installment payment plans, the interest rate, if any, that should be charged, and what standards the Commission or an outside contractor might use to evaluate an applicant's creditworthiness. We also requested comment on how the Commission should treat licensees who default on payments owed the government. We asked whether, for example, licenses should be conditioned on timely payments so that a default would result in immediate license cancellation and whether there should be any grace periods or an opportunity for restructuring the payment plan. We indicated that, if we allow a grace period or restructuring of the payment plan, we would follow our procedures (including the payment of penalties and interest) under the Commission's existing debt collection rules and procedures.[169]

232. Most commenters agree that installment payments are an effective means of addressing the inability of designated entities to obtain financing and will enable them to compete more effectively for auctioned spectrum.[170] They claim that installment payments will minimize the effect of lack of access to capital by small businesses and female and minority owned businesses. Some commenters suggest that for all bidders who have minorities and women as equity participants, the Commission should allow proportionate installment payments equal to that amount of women or minority ownership (*i.e.*, 25 percent minority owned business could pay 25 percent of the bid amount in installments).[171] Other commenters argue that only small businesses should be allowed to defer payments. They assert that giving deferred payment terms to those entities that are large businesses would be unfair to other designated entities.[172] Some commenters also argue for reduced upfront payments and/or deposit payments in conjunction with the installment preference.[173] If interest is charged, a few commenters suggest that designated entities should not be charged interest at a rate higher than the government's cost of money.[174] Other commenters argue that interest should be below the prime rate since large entities are able to borrow at short-term rates below the prime rate using debt instruments such as commercial paper.[175] Finally, some commenters suggest that a designated entity that defaults on installment payments should be granted a three to six month grace period before the license is cancelled to allow an opportunity to cure the default without causing an interruption in service.[176]

233. We conclude that for some auctions, as discussed below, small businesses will be eligible for installment payments. As we mentioned in the Notice, by allowing installments, the government will be extending credit to an eligible winning bidder, thus reducing the amount of private financing needed in advance of the auction by a prospective licensee. This will assist small entities who are likely to have difficulty obtaining adequate private financing. Moreover, because of the problems associated with using a FCC license as collateral for a loan,[177] small, start-up companies' access to capital markets in order to obtain a license and construct their facilities may be even

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[168] NPRM at ¶ 68.

[169] *Id.*

[170] *See, e.g.*, comments of SBA at 20-23, Palmer Communications at 3, Rural Cellular Assoc. at 10, Call-Her at 11, Valley Management at 4, NTIA at 27, Windsong at 4.

[171] *See, e.g.*, comments of Venus at 4, System Engineering at 4.

[172] *See* comments of Unique at 4.

[173] *See, e.g.*, comments of American Wireless at 31, NAMTEC at 20-21, BellSouth at 26, Alliance for Fairness at 13, NABOB at 11, Point at 4, Telephone Assoc. of Michigan at 12, Telepoint at 3, Tri-State at 15-17, Wireless at 3-4.

[174] *See, e.g.*, comments of Cook Inlet at 33-34.

[175] *See* comments of Calcell at 19, Cook Inlet at 33, NAMTEC at 15, SBA at 20-23.

[176] *See, e.g.*, comments of American Wireless at 22, NAMTEC at 16, Corporate Technology Partners at 5, Venus at 4, Point at 4.

[177] *See Radio KDAN, Inc.*, 11 FCC 2d 934 (1968), *recon. denied*, 13 RR 2d 100 (1968), *aff'd on other grounds sub nom Hansen v. FCC* , 413 F.2d 374 (D.C. Cir. 1969); *Kirk v. Merkley*, 94 FCC 2d 829 (1983); *but see also Notice of Proposed Rulemaking and Notice of Inquiry*, MM Docket No. 92-51, 7 FCC Rcd 2654 (1992). In this regard, we do not at this time adopt the suggestions of the Small Business PCS Association and Telepoint that financing organizations be allowed a security interest in a PCS license. *See* comments of Small Business PCS Assoc. at 6-7, Telepoint at 3. The general issue of whether such security interests are permitted under the Communications Act is at issue in MM Docket No. 92-51 and will be addressed in that proceeding.

more difficult. As a result, installment payments will be an effective way to efficiently promote the participation of small businesses in the provision of spectrum-based telecommunications service and an effective tool for efficiently distributing licenses and services among geographic areas.[178]

234. We agree with those commenters that argue that only small businesses, including small businesses owned by minorities and women, should be allowed to defer payments. As discussed below, this approach to allowing installment payments best comports with the intent of Congress in enacting section 309(j)(4)(A), to avoid a competitive bidding program that has the effect of favoring incumbents, with established revenue streams, over new companies or start-ups.[179]

235. In describing the provisions concerning designated entities contained in the House bill, the House Report states generally that the Commission's regulations "must promote economic opportunity and competition," and "[t]he Commission will realize these goals by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses and businesses owned by members of minority groups and women." H.R. Rep. 103-111 at 254. The Report states that the House Committee was concerned that, "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." *Id.* More specifically, the House Committee was concerned that adoption of competitive bidding should not have the effect of "excluding" small businesses from the Commission's licensing procedures, and anticipated that the Commission would adopt regulations that would ensure that small businesses would "continue to have opportunities to become licensees." *Id.* at 255.

236. Consistent with Congress's concern that auctions not operate to exclude small businesses, the provisions relating to installment payments for minorities and women also were intended to assist only minorities and women who are small businesses. The House Report states that these related provisions were drafted to "ensure that *all small businesses* will be covered by the Commission's regulations, *including those owned by members of minority groups and women.*" *Id.* (emphasis added). It also states that the provisions in section 309(j)(4)(A) relating to installment payments were intended to promote economic opportunity by ensuring that competitive bidding does not inadvertently favor incumbents with "deep pockets" "over new companies or start-ups." *Id.* Because the Congressional objective here was to assist "new companies or start-ups," we therefore believe the Commission should consider installment payments only for entities with lesser economic status. As indicated by the legislative history, large entities with established revenue streams were not intended to be beneficiaries of this particular means of financial assistance. In short, the statutory language, when read in conjunction with the legislative history, does not indicate that Congress's purpose was to accord special financial assistance measures under section 309(j)(4)(A) to entities other than those with small economic status. We thus reject the proposals by some commenters to allow installment payments for designated entities irrespective of their size, or to permit proportionate installment payments based simply on the degree of non-controlling investment by designated entities in a bidder.

237. In addition, and consistent with our decision to limit installment payments to small businesses, we believe that installment payments should not be available for all spectrum auctions. Rather, in order to match the preference with eligible recipients of the preference, installment payments will only be available for certain licenses that do not involve the largest spectrum blocks and service areas. (For example, in the context of narrowband PCS, we could adopt installment payments for small businesses in the auctions for smaller spectrum blocks.) We will limit the auctions in which this preference can be used in order to avoid the abuses that will likely result if installment payments are available for every auctioned license. Where the license being auctioned is for a large, valuable block of spectrum, for example, we do not want to create incentives for entities to create small business "fronts" enabling large businesses to become eligible for low-cost government financing. Nor do we desire to delay service to the public by encouraging under-capitalized firms to receive licenses for facilities which they clearly lack the resources adequately to finance. *See* 47 U.S.C. § 309(j)(3)(A). Accordingly, as a general matter, we will only allow installment payments for licenses in those smaller spectrum blocks that are most likely to match the business objectives of *bona fide* small businesses. We stress that this limitation in no way prohibits eligible small businesses from bidding on and acquiring other licenses; it simply limits the licenses that the government will help finance. We shall make determinations regarding the use of installment payments when we adopt competitive bidding rules for specific services.

238. We agree with commenters that a reduced, post-auction down payment for designated entities eligible for installment payments is in order. As suggested by some commenters, the down payment for such entities, which is due five business days after the close of the auction, will be 10 percent of the winning bid, instead of 20 percent. This will provide eligible designated entities with necessary funds for additional application, legal and engineering costs that will be incurred immediately following the auction. Once the license is granted we will require that the remaining 10 percent of the down payment be made within five days of grant, thereby commencing the eligible entity's installment payment plan, which will extend over the period of the license.

239. Finally, we also agree with those commenters that suggest that interest on installments should be charged at a rate no higher than the government's cost of money. We recognize that, in addition to providing a source of financing that might not otherwise be available to small entities, we should impose interest in a manner that is designed to provide significant financial assistance to small businesses. Accordingly, in order to ensure that this government financing results in significant capital cost savings to small businesses, we will impose interest on installment payments equal to the rate for U.S. Treasury obligations of maturity equal to the license term.[180] This rate is generally lower

[178] *See* 47 U.S.C. § 309(j)(3)(A).L

[179] *See* H.R. Rep. No. 103-111 at 255.

[180] We note, for example, that PCS licenses are issued for a ten-year term. *See* 47 C.F.R. § 99.15. In other services with

than the prime lending rate established by private banks. The applicable interest rate will be determined and fixed at the time of licensing. We agree with the commenters that suggest that, to promote the rapid deployment of service by designated entities eligible for installment payments, payment of principal should not begin until after the start-up phase of the business. Therefore, the schedule of installment payments will begin with interest-only payments for the first two years. After that, principal and interest will be amortized over the remaining term of the license, during which the licensees can be expected to be generating income from operations. Further details of the Commission's installment payment program for designated entities will be established in further Orders involving those auctionable services for which installment payments will be available.

240. An eligible designated entity that elects installment payments will have its license conditioned upon the full and timely performance of its payment obligations under the installment plan granted to the licensee. If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default. Any default in this regard could result in the cancellation of the license for failing to meet this condition. However, as recommended by commenters, upon request by a designated entity that has defaulted or that anticipates default under an installment payment program, we will consider providing for a three to six month grace period before a delinquent payor's license cancels. During this grace period, a defaulting licensee could maintain its construction efforts and/or operations while seeking funds to continue payments or seek from the Commission a restructured payment plan. We will evaluate requests for a grace period on a case-by-case basis. In deciding whether to grant such requests or to pursue other measures we may consider, for example, the licensee's payment history, including whether it has defaulted before and how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under a distress sale policy.[181] Following a grace period without successful resumption of payment or upon denial of a grace period request, we will declare the license cancelled and take appropriate measures under the Commission's debt collection rules and procedures. *See* 47 C.F.R. Part 1, Subpart O.

2. Bidding Credits

241. Among the variety of measures discussed in the Notice, we also asked for comment on the use of bidding credits or bidding preferences for designated entities.[182] Bidding preferences would allow eligible applicants to receive a payment discount (or credit) for their winning bid. Under this approach, if the eligible entity submits the winning bid, it would be required to pay only a certain percentage of its actual bid. Since the bidding credit is actually a payment discount determined at the end of the auction, it will not be difficult to compare bids among eligible and non-eligible bidders during the auction. Many commenters support bidding preferences instead of, or in addition to, set-asides. They claim that bidding credits address the inability of designated entities to obtain capital and would encourage non-designated entities to enter into joint ventures with designated entities.[183] Some commenters advocate linking the amount of the bidding preference with the degree of designated entity participation.[184]

242. We believe that it may be necessary to provide bidding credits to designated entities to achieve the objectives of Section 309(j)(4)(D). Bidding credits may be necessary to ensure that eligible designated entities have the opportunity to participate successfully in auctions for certain services. Therefore, competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures. For example, in service-specific rules, we may determine that a bidding credit of up to 25 percent would provide the opportunity to bid successfully for a license.[185] This determination may rest in whole or in part on our assessment of the available opportunities in, and characteristics of, a specific spectrum-based service. As described above, such bidding credits would operate as payment discounts for entities that receive the credits. We also reserve the option to determine, on a service-specific basis, whether certain auctionable services should allow other bidding credits to a consortium of companies organized to bid for auctionable services. To qualify for a bidding credit in this circumstance, the consortium would be required to demonstrate that it has significant equity participation by one or more designated entities and that designated entities will have significant operational roles in the provision of service to the public.

243. We will institute a system of bidding credits for rural telephone companies that is designed to further promote the investment in and rapid deployment of new technologies and services in rural areas. *See* 47 U.S.C. § 309(j)(3)(A). At the outset, we generally conclude that any preferential measures for rural telephone companies, such as bidding credits, should be limited to bidding for licenses in their rural service areas.[186] As several commenters point out, such an approach satisfies Congress's objectives without unduly favoring rural telephone companies in markets where there is no compelling reason to do so. Specifically, these commenters note that Congress was concerned with assuring rural consumers the benefits of new technologies

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shorter license terms, we may base the interest rate applicable to installment payments on government instruments of similar duration.

[181] *See* ¶ 257, *infra*.

[182] *See* NPRM at ¶ 80.

[183] *See, e.g.*, comments of Palmer at 4-5, NABOB at 10-11.

[184] *See, e.g.*, comments of Cook Inlet at 32, NAMTEC at 15, Sprint at 10, AWCC at 20, George E. Murray at 12-13.

[185] *See, e.g.*, comments of SBA Associate Administrator for Procurement Assistance at 1, *citing* the Department of Defense program granting a 10 percent credit to contract bidders under Section 1207 of Pub. L. No. 99-166.

[186] Some commenters have suggested the partitioning of PCS licenses so as to permit rural telephone companies to hold licenses to provide service only in their service areas. *See, e.g.*, comments of GVNW at 2-4, and NTCA at 13. Partitioning may indeed be a means to achieve Congress's goal of ensuring that advanced services are provided in rural areas, but this issue is a subject of our reconsideration of the broadband PCS allocation rules. *See generally Second Report and Order* in GN Docket No. 90-314, 8 FCC Rcd 7700 (1993) (petitions for reconsideration and clarification pending). This issue will be addressed in the context of the PCS allocation rules.

and providing opportunities for participation by rural telephone companies in the provision of wireless services that supplement or replace their landline facilities.[187] We agree. Rural telephone companies, as defined below, will be eligible for bidding credits for specified licenses only in their service areas. This approach is consistent with Congress' intent to ensure that rural consumers receive the benefits of new technologies and to provide opportunities for participation by rural telephone companies in the provision of wireless services. Rural telephone companies would still be allowed, where eligible, to bid on other licenses outside their service areas.

244. The amount of the bidding credit for rural telephone companies will be tied to their commitments to achieve certain telecommunications infrastructure build-out milestones in their rural service areas. These milestones will be greater than those set forth in the particular service rules. The amount of the bidding credit will be proportionately linked to the amount by which the rural telephone company agrees to expand its build-out commitment. Failure to meet a build-out commitment will result in liability for a penalty in the amount of the bidding credit, plus interest at the rate applicable to installment payments. Grant of licenses to rural telephone companies utilizing bidding credits will be conditioned upon payment of this penalty, if and when it becomes applicable. We believe that this added requirement best fulfills the congressional objective of developing and rapidly deploying new services to those residing in rural areas.

3. Spectrum Set-asides

245. In the Notice we specifically asked for comments on setting aside blocks of spectrum for designated entities. NPRM at ¶ 4. Thus, we indicated that specified spectrum blocks could be open to bidding only by applicants that fall under one of the definitions for the eligible entities. *Id.* at ¶ 73. We also noted that measures such as set-asides may be better suited for some services than for others.[188]

246. Many parties commented on spectrum set-asides as they relate to specific services, such as broadband PCS. We shall address in subsequent orders those comments that relate primarily to set-asides in those services. Many parties support set-asides as a general matter and some argue that only by using set-asides can the Commission carry out the injunction in section 309(j)(4)(D) "to ensure" that designated entities are given the "opportunity to participate in the provision of spectrum based services."[189] Others, such as BellSouth and Sprint contend that to set aside spectrum blocks for bidding by women- or minority-owned applicants would be unconstitutional and inconsistent with legislative intent and the public interest.[190]

247. After consideration of the comments, we believe that, to "ensure" the opportunity for designated entities' participation in spectrum-based services under section 309(j)(4)(D), some spectrum may need to be set aside specifically for bidding by such entities. In this regard, we disagree with commenters who contend that Congress's rejection of the use of a set-aside for rural telephone companies demonstrates that set-asides were not the intended method for effectuating statutory objectives for any of the designated groups. Rather, we agree with Iowa Network that, although Congress decided not to require the Commission to reserve certain spectrum blocks for rural telephone companies, Congress did not prohibit the use of such measures for other classes of designated entities. Indeed, set-asides may be necessary to accomplish the statutory objectives of section 309(j)(4)(D). In subsection F below, we address the constitutionality of set-asides and other preferences for minorities and women.

248. We have also decided that, for any auctions of set-aside spectrum, a reduction in the upfront payment amount may also be appropriate. This lower payment would serve to encourage participation by all eligible designated entities in the auction. We anticipate that we will establish lower upfront payments in any particular auctions for set-aside spectrum and that such payments will be based on the characteristics of the service and the nature of the expected pool of bidders.

4. Tax Certificates

249. In the Notice we tentatively concurred with the SBAC Report that different approaches may be appropriate to address the specific concerns applicable to each enumerated entity. We indicated that we could allow deferred payment terms for small businesses and tax certificates for businesses owned by women and minorities.[191] The SBAC Report recommended several ways that the Commission could issue tax certificates. For instance, the Commission could enable owners and investors of minority owned and controlled licenses obtained through competitive bidding to obtain tax certificates upon sale of their stock interests, provided that the entities remain minority owned and controlled. *See* NPRM at ¶ 80, n.64. Another example would enable licensees that assign or transfer control of their license to designated entities to obtain tax certificates.

250. Most commenters who discuss this option advocate the use of tax certificates when an auction winner sells a license to a designated entity and when a designated entity sells a minority interest to a non-controlling investor.[192] Some commenters believe that tax certificates should be available to minority and female owned businesses that are not also small businesses. Also, if an entity qualifies for both installments and tax certificates, commenters suggest that the licensee be required to specify which preference it wished to use.[193] One commenter opposed the use of tax certificates generally because it believes that tax certificates would not sufficiently assist designated entities.[194] Others argue that tax certificates should be used to assist designated entities in acquiring, not disposing of, licenses.[195]

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[187] *See, e.g.*, comments of SBA at 15, BellSouth at 28-29, AT&T at 26 n.31, Citizens at 5-6, Telocator at 11.

[188] *Id.* at ¶ 75.

[189] *See, e.g.*, comments of AWRT at 8, NRTA at 8, Iowa Network at 8-11, Iowa Network (Reply) at 4-5, Minority PCS Coalition at 5.

[190] *See* comments of BellSouth at 18-23, Sprint at 10-11.

[191] *See* NPRM at ¶ ¶ 79-80.

[192] *See, e.g.*, comments of NAMTEC at 16-17, Palmer Communications at 4, NTIA at 27-28, MCI at 14, Calcell at 26-27, ARAT at 5.

[193] *See* comments of Unique at 2-4, LuxCel Group, Inc. at 3.

[194] *See* comments of Brown and Schwaninger at 4.

[195] *See, e.g.*, comments of Quentin L. Breen at 4.

251. We generally agree with those commenters who argue that, for purposes of attracting investment in designated entities, tax certificates may not be sufficient as a principal mechanism to assist designated entities. As described above, we have decided to rely primarily on other measures to eliminate barriers to entry into the telecommunications field by designated entities. Therefore, we will not at this time adopt a general tax certificate program for services subject to competitive bidding. We believe that the other available measures, such as bidding credits, will generally provide sufficient incentive to attract investors in designated entity enterprises. We agree at this time, however, that tax certificates could be useful as a means of creating incentives both for designated entities to attract capital from non-controlling investors and to encourage licensees to assign licenses to designated entities in post-auction transactions. We will examine the feasibility of utilizing tax certificates in subsequent competitive bidding rules for particular services, especially where the record demonstrates a need to further stimulate designated entity participation in spectrum auctions and in the after-market for auctioned services.

5. Royalty payments

252. In the Notice we indicated that another measure that could be made available to designated entities would be a combination of an initial payment and royalties. We noted that this system is used by the Department of the Interior for outer continental shelf oil and gas leases. Firms bid on the amount of the initial payment and pay royalties at a fixed rate set by the government. If the FCC is licensing a highly risky service and the government (taxpayers) is better able to bear risk than the firm (shareholders), there may be an advantage to have some part of the payment in the form of a royalty.[196] The SBA endorses royalty payments for designated entities because payment is tied to receipt of income as opposed to lump sum and installment payments. For these entities, payment prior to receipt of income may divert scarce capital from construction requirements.[197] Other commenters claim that royalties are not necessarily more burdensome to collect if the Commission establishes clear guidelines based on an applicant's own cash flow analysis.[198]

253. We do not adopt royalties as an alternative payment method for designated entities. As we stated in the Notice, this approach must be weighed against several difficulties. First, if the royalties are based on the output or revenues of the winning firm they will act as a tax and tend to reduce output.[199] Second, royalties on FCC licenses may be very costly to administer. Unlike oil and gas royalties there is no easily identifiable output associated with the license. To collect royalties on Commission licenses the agency must establish accounting rules for identifying the share of revenues or profits attributable to such licenses. This is likely to prove extremely intrusive and difficult to implement in practice, especially when a license is used by a firm as part of a highly integrated communications service. Finally, the Commission may have difficulty determining an appropriate royalty rate to apply in all circumstances. Accordingly, we adopt our tentative conclusion in the notice not to develop a royalties payment program for designated entities. However, as noted above, we agree with SBA that it would be fair to schedule payment to the government after the start-up phase of the business when licensees typically begin receiving income from operations, as we are doing in the case of installment payments.

6. Innovator's preference

254. In the Notice we requested comment on the SBAC's proposal to provide an "innovator's bidding preference," which would be designed to encourage participation by designated entities, and by strategic small business alliances, by awarding credits equal to 10 percent of an applicant's bid.[200] Under the proposal, alternative bidding calculations would allow technical and non-technical innovators to discount, or amortize, the bid the applicant would otherwise pay based on a qualitative assessment of the applicant's business development proposal. To qualify for the credit, the SBAC Report states that the bidder would have to qualify as (a) a member of a designated entity, or (b) a consortium owned and controlled by firms owned by members of the designated entities. We asked for comment on the extent to which members of the preferred groups can be deemed to be "technical innovators," and the extent to which it is feasible to reach such determinations prior to conducting individual auctions.

255. In ET Docket No. 93-266, we are currently reviewing our pioneer's preference rules in light of the Commission's new competitive bidding authority. *See* Notice of Proposed Rule Making in ET Docket No. 93-266, 8 FCC Rcd 7692 (1993). The pioneer's preference rules currently award innovation by providing a means by which an applicant that demonstrates having developed a new communications service or technology may obtain a license without being subject to mutually exclusive applications. *See* 47 C.F.R. § 1.402. In the pioneer's preference review proceeding, we requested comment on alternatives to a dispositive preference in a competitive bidding environment, including a bid discount for designated innovators. 8 FCC Rcd at 7694. We asked for specific comments in that proceeding regarding the innovator's preference proposals for designated entities set forth in the Notice in this proceeding. *Id.* at 7694, n.13.

256. Since the innovator's preference proposal for competitive bidding is inextricably related to our general review of the pioneer's preference rules, this issue will be resolved in ET Docket No. 93-266.[201]

7. Distress Sales to Designated Entities

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[196] Under a royalty program, the Commission could, for example, allow the winning bidder to pay for its license from a percentage of the revenues it generates from the operation of its licensed facilities. To minimize the risk to the Commission, it could establish a fixed, minimum royalty payment plus a percentage of gross revenues.

[197] *See* comments of SBA at 24; *see also* comments of Calcell at 19-21.

[198] *See* comments of JMP Telecom Systems at 3.

[199] *See* comments of BellSouth at 26.

[200] *See* NPRM at ¶ ¶ 50 and 80, n.61.

[201] Several commenters suggest that we provide waivers or exceptions to our PCS rules concerning spectrum aggregation or cellular cross-ownership where an applicant enters into partnerships or other joint ventures with designated entities. *See, e.g.*, comments of Bell Atlantic at 15, AWCC at 33-34, Cook Inlet at

257. In the Notice we requested comment on the SBAC's distress sale proposal. We indicated that the proposal would encourage transfers to designated entities where winning bidders are unable to pay, ineligible, or unqualified.[202] Only a few commenters addressed this proposal.[203] For example, one commenter suggested that distress sales be utilized in the event a designated entity defaults on its installment payments.[204] Since distress sales, if adopted, would be a post-auction measure designed to provide additional opportunities to designated entities to participate in the provision of spectrum-based services, we have decided not to resolve this issue at this time. Rather, we will evaluate the success of our other measures adopted herein and in our service-specific rules and determine whether distress sales should be authorized.

D. Preventing Unjust Enrichment

258. Section 309(j)(3)(B) requires that the Commission craft our competitive bidding rules so as to "promot[e] economic opportunity and competition and ensur[e] that new and innovative services are readily available to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including [designated entities]." To ensure that our preference measures are effective, however, we must also adopt rules that will prevent abuse of our preference measures. *See* Section 309(j)(4)(E). In particular, we must adopt rules to ensure that the preferences foster the creation of new telecommunications businesses owned by designated entities which will continue to provide telecommunications services. Our rules are intended to prevent designated entities from profiting by the rapid sale of licenses acquired through the benefit of our preference policies. This goal is wholly consistent with Congressional intent: "to the extent that the Commission is attempting to achieve a justifiable social policy goal . . . licensees should not be permitted to frustrate that goal by selling their license in the aftermarket." H.R. Rep. No. 103-111 at 257.

259. We wish to ensure against unjust enrichment in those situations where Congress recognized that the likelihood of unjust enrichment was highest, or specifically when licenses were obtained under circumstances where the government undertook special efforts to limit competition for licenses to ensure opportunities for certain classes of applicants, *i.e.*, the designated entities. We therefore are adopting unjust enrichment rules applicable specifically to designated entities to deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our preferences to obtain a license at a lower cost than they otherwise would have to pay and later to sell it at the market price. We have decided that we may rely on three principal preferences for designated entities -- installment payments, set-asides and bidding credits -- and each leads to a different method to prevent abuse and unjust enrichment. These methods are discussed below. We may also employ other methods, such as random audits, to ensure that entities purporting to be designated entities have retained that status after being awarded licenses. Of course, as discussed below, in circumstances in which penalties are applicable, licensees that wish to take actions relating to ownership or control that would result in loss of designated entity status must also report those proposed actions to the Commission.

260. *Designated Entity Set-asides.* If licenses are set aside for application exclusively by designated entities, the concern expressed by Congress over unjust enrichment is great. If a tclass of licenses is exclusively assigned for use by designated entity applicants, it is reasonable to assume that these licenses will be auctioned at a lower price than they would bring if they were not set-aside. It would be unjust and inconsistent with the will of Congress for such preferred licensees to obtain a license with the government's help, transfer that license after a short period of time to an entity that was not entitled to special treatment at the auction, and appropriate for themselves the difference between the full market value of the license and the discounted price which they paid the government for that license. Therefore, if we employ set-asides to benefit some or all of the designated entities, we will impose a recapture provision, applicable in the event of sale to a non-designated entity, that would be designed to recoup for the government a portion of the value of the benefit received by the designated entity in the bidding.

261. Such a recapture provision would require that licensees seeking to transfer their licenses for profit (or to take other actions relating to ownership or control that cause them to lose their status as designated entities) must, within a specified time remit to the government a penalty equal to a portion of the total value of the benefit conferred by the government.[205] If similar licenses that are not set-aside are auctioned at the same time as set-aside licenses, the penalty would be set based on the price at which non-set-aside licenses were awarded. In other cases, the Commission will calculate the value of the difference between the set-aside price and the price that would have been obtained at auction without a set-aside. The Commission will make this initial calculation and the burden will be on the applicant to disprove this amount.

262. In order to encourage efficiency and reward entities that have provided valuable services, we will generally reduce the penalty as time passes or construction benchmarks are met. However, because license terms and construction requirements vary by service, we will set forth any specific recapture provisions in competitive bidding rules applicable to any services in which we decide to set aside licenses. In no event will recapture provisions apply to the transfer or assignment of a license that has been held for more than five years. If the transfer is to be made to another eligible designated entity, there would be no pen-

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28-29, NAMTEC at 22, and Murray at 12. With regard to broadband PCS, these and other issues have been raised in petitions for reconsideration of those rules. It therefore would be better addressed in the context of that proceeding. *See generally Second Report and Order* in GN Docket No. 90-314, 8 FCC Rcd 7700 (1993) (petitions for reconsideration and clarification pending). In other proceedings, such a determination will be made in orders addressing each auctionable service.

202 NPRM at ¶ 71, *citing* SBAC Report at 16.

203 *See, e.g.*, comments of Chickasaw Telephone Company at 6.

204 *See* comments of Corporate Technology Partners at 5.

205 We might, in appropriate circumstances, waive recapture if the licensee had incurred substantial start-up costs or made significant capital investments with the intention of starting service, but due to circumstances beyond its control, was unable to provide service.

alty. In the event that a penalty is assessed, the penalty will not prevent the transferring designated entity from recovering the depreciated value of its capital investment. Similar approaches found support in the comments of Calcell Wireless and Wisconsin Wireless Communications.

263. *Designated Entity Installment Payments and Bidding Credits.* Where other preferential measures are employed (*i.e.*, installment financing or bidding credits), the Commission will impose appropriate unjust enrichment measures. For example, if a small business making installment payments sells its license to an entity that does not qualify under the standards we have set for small businesses, we will require payment of the full amount of the remaining principal balance as a condition of the license transfer. We recognize that this remedy may still allow some gains to accrue to a small business licensee who makes installment payments at a relatively low interest rate and then transfers the license, but we expect the number of such instances to be small and believe that the magnitude of such gains would not warrant the cost of calculating and imposing penalties to address this concern.

264. Where bidding credits are used, the Commission will require a designated entity seeking approval for a transfer of control or an assignment of license to a non-designated entity, or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, to reimburse the government for the amount of the bidding credit, plus interest at the rate imposed for installment financing at the time the license was awarded, before transfer of the license will be permitted. This approach was supported in the comments as well. *See, e.g.*, comments of BellSouth at 32-33. The penalty will be equal to the current value of the bidding credits. If the bidding credit was related to a designated entity's commitment to expanded construction requirements, and the construction requirements extend over the term of the license, the penalty will not be reduced over time.

265. These modest requirements address Congressional concerns over unjust enrichment but should not inhibit investment or economic growth. Because of our concerns on the possible impact of transfer restrictions on willingness to invest in the industries we regulate, we are not adopting our proposal to establish a minimum time during which transfer of licenses obtained through competitive bidding would be prohibited. As we recognized in ¶ 84 of the NPRM, such restrictions "may block or delay efficient market transactions needed to attract capital, reduce costs, or otherwise put in place owners capable of bringing service to the public expeditiously."

E. Definitions

266. In the Notice we requested comment on definitions to apply to the designated entities enumerated by Congress. These definitions are important both to establish eligibility criteria and to deter the use of sham companies to take advantage of the benefits meant for groups truly in need of the measures outlined above. *See* NPRM at ¶ ¶ 77-78.

1. Small Business

267. With regard to small businesses, we asked parties to discuss whether we should rely on the definition devised by the Small Business Administration (SBA). NPRM at ¶ 77. We noted that the SBA definition permits an applicant to qualify for financial assistance based on a net worth not in excess of $6 million with average net income after Federal income taxes for the two preceding years not in excess of $2 million. Alternatively, an applicant for SBA assistance can qualify by showing that together with affiliates, and excluding affiliates, it meets the size standard for the industry in which it is primarily engaged as set forth in 13 C.F.R. 121.601. NPRM at ¶ 77, n.51. This size standard translates into a business with less than 1500 employees for the telecommunications industry. 13 C.F.R. 121.601.

268. Many commenters, including the Chief Counsel for Advocacy of the SBA, argue that the SBA net worth/revenue definition is too restrictive and will exclude businesses of sufficient size to survive, much less succeed, in the competitive wireless communications marketplace. The SBA's Chief Counsel and Suite 12 Group advocate adoption of a revenue test, arguing that a net worth test could be misleading as some very large companies have low net worth. The SBA's Chief Counsel recommends that the revenue standard be raised to include firms that (together with affiliates) have less than $40 million in revenue. Similarly, Suite 12 suggests a $75 million in annual sales threshold.[206] As another option, the SBA's Chief Counsel suggests that the Commission consider a higher revenue ceiling or adopt different size standards for different telecommunications markets.[207]

269. Other parties worry that the definition used by the Commission might impede the ability of small businesses to raise capital in anticipation of auctions. They note that many small firms are soliciting investors to enable these firms to compete better in auctions, and argue that their designated entity status should not be jeopardized as a result. Thus, these commenters suggest, if the FCC adopts the SBA's net worth standard, the net worth valuation should relate back to the date of the PCS Final Report and Order (September 23, 1993).

270. In contrast, several commenters argue that the small business definition must be made more restrictive in order to prevent large firms from spinning off companies to compete as designated entities. In this regard, some parties recommend limiting preferences to those small businesses that were in existence for the previous two years.

271. We believe that in most circumstances the existing SBA net worth/income size standard is the appropriate threshold for small businesses to qualify as designated entities. At this juncture, we are unable to conclude that the

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[206] Many other commenters set forth their recommendations on the appropriate small business definition. *See, e.g.*, comments of Tri-State ($5 million average annual operating cash flow), Luxcel (net worth not exceeding $20 million), and Iowa Network (less than $40 million in annual revenues and 50,000 or fewer access lines).

[207] Some parties recommend using the SBA's 1500 employee standard. *See, e.g.*, comments of SBA Associate Administrator for Procurement Assistance at 2, CFW Communications at 2, and Iowa Network at 17. A number of other commenters argue, however, that adoption of this alternative SBA definition would open up a huge loophole in the designated entity eligibility criteria. Specifically, they contend that telecommunications is a capital, rather than labor, intensive industry, and that an entity with 1,500 employees is likely to be extremely well capitalized and have no need for the special treatment outlined by Congress in the Budget Act. *See, e.g.*, comments of LuxCel Group, Inc. at 4, Suite 12 Group at 10-11.

other proposals suggested by commenters are superior to this established standard. In this regard, we also note that the legislative history indicates that the SBA's Chief Counsel and other commenters are correct that in certain telecommunications industry sectors this standard may not be high enough to encompass those entities that require the benefits, but also have the financial wherewithal to construct and operate the systems. Nevertheless, the threshold can be adjusted upward on a service-by-service basis to accommodate such situations. Thus, in order to qualify as a small business eligible to receive designated entity benefits, the applicant must show that, together with its affiliates, the entity has no more than a $6 million net worth and after federal income taxes (excluding any carry over losses), does not have in excess of $2 million in annual profits for the previous two years. This small business definition may be modified, however, if the SBA changes its definition or the Commission deems that an alternative definition is more appropriate for capital intensive services, for example.

272. The inclusion of all "affiliates" of the entity for purposes of the net revenue/net worth calculation should alleviate the concerns of some commenters who fear competing with the "designated entity" affiliates of large, well-financed corporations. Moreover, we intend to scrutinize relationships between parties very carefully to determine if they rise to the level of affiliation. As provided in the SBA regulations, for example, we will consider entities to be affiliates of each other when, either directly or indirectly, one entity controls or has the power to control the other, or a third party or parties controls or has the power to control both. *Compare* 13 C.F.R. § 121.401(a)(2). Thus, stock options, convertible debentures, and agreements to merge will be treated as if the rights thereunder already had been exercised.[208] Likewise, financing agreements may result in a finding of affiliation if the debt relationship essentially gives the creditor the power to control the enterprise -- for example, if the size of the debt is particularly large, the terms of the loan are not commercially reasonable, and the definition of default is unconventional. Affiliation may also arise when entities have common officers, directors, or key employees, or when they enter into joint ventures. *See* 13 C.F.R. 121.410. Given this close scrutiny of business relationships, we do not think it is necessary to require small businesses to have been in existence for two years to qualify as designated entities. Such a rule would unduly restrict the entry of *bona fide*, newly-formed bidders.

273. Finally, as recommended by a number of parties, we reject the SBA's alternative 1,500 employee standard as a means to qualify as a designated entity. We agree with those commenters that argue that such a definition is too inclusive and would allow many large telecommunications firms to take advantage of preferences not intended for them.

2. Minority- and Female-Owned Businesses

274. In the Notice, we proposed to rely on existing Commission definitions of minority and female owned businesses. We asked for comment, however, on whether we should require women and minority backed applicants to be 50.1 percent owned by members of these groups or whether simple control, regardless of equity ownership, would be sufficient.

275. Most commenters favor strict eligibility criteria in this area in order to prevent abuse. They argue that minorities and women should be required to have both 50.1 percent voting control and a significant equity interest (at least 20 percent) in the applicant to qualify for designated entity status. Numerous commenters contend that preferences should be granted only to applicants that are more than 50 percent female or minority owned. They assert that such a requirement is necessary to fulfill the legislative intent of Section 309(j), which explicitly requires the Commission to foster opportunities for "businesses *owned* by members of minority groups and women." In addition, a number of parties recommend that minorities and women should be required to have control of day-to-day management and operations of the entity.

276. Other parties recommend, however, that eligibility extend to businesses over which women or minorities have actual operating control, even if they do not have a majority share of the equity. They argue that such a standard would enhance the ability of female and minority entrepreneurs to obtain financing.

277. We are persuaded by the commenters that, to establish "ownership" by minorities and women, we should adopt a strict eligibility standard that requires minorities or women to have at least a 50.1 percent equity ownership and a 50.1 percent controlling interest in the designated entity. In the context of limited partnerships, the general partner must be a minority and/or a woman (or an entity 100 percent owned and controlled by minorities and/or women) that owns at least 50.1 percent of the partnership equity. The interests of minorities and women in designated entities will generally be calculated on a fully-diluted basis. Thus, agreements such as stock options and convertible debentures will generally be considered to have a present effect on the power to control the entity and will be treated as if the rights thereunder already have been fully exercised. We will depart from the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis only upon a demonstration, in individual cases, that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity.

278. We seek to encourage designated entities to raise capital by selling less than controlling interests in their companies. We recognize that there may be situations in which a designated entity may be able to best attract equity by offering investors such inducements as preferential dividends, liquidation preferences and other incentives typically offered to noncontrolling principals. We do not intend to restrict the use of such financing mechanisms, provided that the minority and female principals continue to maintain 50.1 percent of the equity on a fully-diluted basis and that their equity interest entitles them to a substantial stake in the profits and liquidation value of the

[208] An affiliate cannot use such options, debentures and agreements, however, to appear to have relinquished control over another entity before it actually does so. *Compare* 13 C.F.R. § 121.401(f).

venture relative to the non-controlling principals. While different standards may be appropriate in other contexts, our objective here is to deter the establishment of sham companies in a manner that permits easy resolution of eligibility issues without the delay of administrative hearings, and thereby to achieve one of the primary purposes underlying the auction statute.[209] Of course, applicants must ensure and be prepared to demonstrate that *de facto* control truly resides with the minority or female principals. While control over daily operation remains one of several factors in determining *de facto* control,[210] we will not require that the minority and female principals devote their full time and attention to the day-to-day management and operations to qualify for available preferences, provided that the designated entity can demonstrate that the minority and female principals are in control of the enterprise.

3. Rural Telephone Companies

279. We also tentatively decided to base our definition of rural telephone companies on existing Commission rules and policies and, thus, proposed that they qualify for designated entity status if they are eligible for exemption from the cable television-telephone company cross-ownership prohibition contained in Section 63.58 of our Rules (*i.e.*, they serve no community with more than 2,500 inhabitants). In addition, we sought comment on whether we should impose geographic restrictions on the rural telephone company preference or if such companies should be able to obtain a preference in any market licensed by the Commission.

280. Most commenters argue that the 2,500 hundred resident standard contained in Section 63.58 is too restrictive and is not related to Congress's concerns.[211] For example, Iowa Network and Telephone Electronics assert that the 2,500 population limit in the rule was not meant to define rural telephone companies, but rather to carve out a narrow exception to the telephone-cable cross-ownership restriction.[212] Likewise, NTCA argues that it is neither necessary nor appropriate to use the same criteria top define rural telephone companies in rules pertaining to a different service, technology, and industry.[213]

281. As an alternative, many commenters support OPASTCO's proposal to limit rural telephone eligibility to carriers serving communities with no more than 10,000 inhabitants, asserting that such a standard better comports with common notions about which telephone companies are "rural."[214] A number of other commenters also suggest that the definition of rural telephone company should include a limitation on the size of the company. OPASTCO, for example, asserts that such a limitation would comport with the statutory mandate to ensure opportunity for rural telephone companies because "the problem such companies face in the competitive bidding arena" is as much a function of their size as of the rural character of their service areas."[215] NTCA similarly contends that small companies have shown the interest and commitment needed to fulfill the explicit statutory goal of "rapid deployment of new . . . services for . . . those residing in rural areas," citing as support a report on the deployment of digital switching by small LECs.[216] The commenters differ on the what the proper measure of a company's size should be. McCaw and TDS, for instance, recommend that the total number of access lines served by a rural telephone company must not exceed 150,000, while the SBA advocates a 50,000-line cap. Other parties suggest that the Commission adopt a definition similar to the one that appeared in the unenacted antecedent of the Budget Act, S.1134: a rural telephone company either (a) "provides telephone exchange service by wire in a rural area" (*i.e.*, a non-urbanized area containing no incorporated place with more than 10,000 inhabitants), (b) "provides telephone exchange service by wire to less than 10,000 subscribers," or (c) "is a telephone utility whose income accrues to a State or political subdivision thereof."

282. As discussed previously, rural telephone companies may be eligible for bidding credits. We agree with many of the commenters that the standard contained in Section 63.58 of our Rules is unnecessarily restrictive for purposes of this proceeding. Thus, as recommended by OPASTCO, in order to be eligible for a bidding preference on a particular license, rural telephone companies must not serve communities with more than 10,000 inhabitants in the licensed area. On the other hand, we believe that a limitation on the size of eligible rural telephone companies is appropriate, because we do not believe Congress intended for us to give preferences to large LECs that happen to serve small rural communities. Thus, as suggested by SBA, in order to be eligible for a preference, a rural telephone company must not have more than 50,000 access lines, including all affiliates.[217]

4. Designated Entities and Consortia

283. In the Notice we asked interested parties to comment on how to apply the designated entity eligibility criteria to consortia. Specifically, we sought comment on whether such consortia must be wholly or predominantly comprised of eligible designated entities to qualify for special treatment. NPRM at ¶ 78.

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[209] We see no reason to depart from the Commission's current definition of the term minority, which includes "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 980 n.8 (1978); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849, 489 n.1 (1982). We do agree with the comments of some parties, who suggested restricting minority preferences to citizens of the United States. Thus, minority and female owned businesses will be eligible for preferences only if voting control and at least 50.1 percent of the equity resides with minorities and women who are United States citizens.

[210] *See, e.g., Intermountain Microwave*, 24 Rad. Reg. 983, 984 (1963); *Cellular Control Notice*, 1 FCC Rcd 3 (1986).

[211] *See, e.g.*, comments of NRTA, NTCA, Rochester Telephone Corp., Iowa Network, TAM, SBA, PMN and Small Telephone Companies of Louisiana.

[212] *See* Comments of Iowa Network at 13 and Telephone Electronics at 11.

[213] *See* comments of NTCA at 4.

[214] *See, e.g.*, comments of Iowa Network, Saco River and Telephone Electronics.

[215] Comments of OPASTCO at 5.

[216] Comments of NTCA at 7-8.

[217] If a rural telephone company qualifies as a designated entity on some other basis (*e.g.*, as a small business), it will be eligible for installment payments in other markets on that ground.

284. Commenters present a range of proposals concerning the treatment of consortia in this regard. Some commenters believe that the consortium seeking a preference must itself meet the criteria for designated entity eligibility.[218] Others suggest that, to qualify as a designated entity, at least half of the aggregate equity interest should be held by designated entities.[219] Still others propose that such consortia should only be controlled by designated entities, even if designated entities have less than a 50 percent combined equity stake.[220] Finally, some believe a qualifying consortium must be controlled by designated entities *and* designated entities must hold a majority of the equity in the venture.[221]

285. Other commenters state that a consortium should be deemed eligible for designated entity benefits if all of its members qualify as designated entities individually, even if the consortium as a whole does not qualify because, for example the rural telephone companies in the consortium together serve communities with more than 10,000 inhabitants.[222]

286. The issue here is whether we should provide an exception to the above eligibility criteria for applicants that are a consortium of various individual entities, most or all of which qualify as designated entities individually. We do not believe that such combinations, if they deviate from our standard definitions of designated entities, should be eligible for preferences expressly designed for designated entities. Accordingly, we reject proposals to accord preferences to consortia of otherwise eligible designated entities that, when combined, result in a new entity that does not meet our definitions.

287. Our policy objective, as noted above, is to provide economic opportunity to those entities designated in the statute and to ensure such entities the opportunity to provide spectrum-based services. Establishing exceptions to our definitions for consortia (even those wholly composed of otherwise qualified designated entities) would undermine this objective. If applicants made up of a number of entities were allowed special treatment, the economic opportunity for individual qualified designated entities would be diluted. Moreover, we believe that allowing applicants to be formed from a combination of eligible and ineligible entities would invite attempts to abuse the designated entity preferences by those not entitled to them. Accordingly, every applicant seeking special treatment as a designated entity (whether such applicant is an individual person or a separate entity, a joint venture or consortium, an unincorporated association of entities, or a standard partnership or corporation), must certify, and be prepared to show, that it meets the definitions established for designated entities in our rules. As noted above, we may determine on a service-specific basis to allow a consortium to receive other benefits based on equity and operational participation in the consortium by one or more designated entities, but such a consortium would not be entitled to qualify for preferences designed specifically for entities meeting the definitions set forth above.

288. The above discussion should not be construed as preventing applicants and licensees for individual licenses for different spectrum blocks or different markets from entering into arms-length agreements concerning the cooperation or coordination of separate facilities, so long as each applicant or licensee retains control over the license and so long as such arrangements are consistent with our affiliation rules and other restrictions against collusion and agreements in restraint of trade. Since designated entities would still retain control of their licensed facilities under such arrangements, cross-license, arms-length arrangements between or among designated entities, and between designated entities and non-designated entities are consistent with our policies discussed above. Moreover, such arrangements could result in more efficient aggregation of ubiquitous, interoperable service offerings that could not be obtained through the auction process.

F. Constitutional Issues

289. If we determine that race or gender-based preferences are necessary to satisfy the statutory command of section 309(j)(4)(D), we must also address the constitutionality of such measures. In the Notice, we stated that the proper standard of scrutiny to be employed in this context is the "intermediate scrutiny" standard used in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). Virtually all of the commenters agree that *Metro* 's intermediate scrutiny standard should be applied in these circumstances, and we also note that recent case law fully supports that conclusion. *See S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 767 (11th Cir. 1991); *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992); *see also Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992). Further, as the *Metro* case did not involve federal action vis-a-vis the states, it is also clear that the intermediate scrutiny standard may be applied in circumstances that go beyond those in which Congress exercises its powers under section 5 of the Fourteenth Amendment.[223] Thus, intermediate scrutiny is to be applied even if the measures are deemed to relate solely to the Federal government's activities.

290. Applying the *Metro* standard itself, *Metro* instructs that benign race-conscious measures approved by Congress do not violate the equal protection clause if they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives. 110 S. Ct. at 3008-09. We agree with the vast majority of commenters who contend that preferential measures afforded under section 309(j)(4)(D) serve important governmental objectives sufficient to satisfy *Metro*. The commenters agree with the assertion in the Notice that, from the language and history of the section, it is evident

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[218] *See, e.g.*, comments at McCaw at 21, Meyers at 6, Pacific Bell at 21 (regarding preferences for female or minority ownership specifically).

[219] *See* comments of Sprint at 10, and PMN, Inc. at 9.

[220] *See, e.g.*, comments of SBA at 15-17, Southwestern Bell at 41, and Chickasaw Telephone Company at 6-8.

[221] *See* comments of AT&T at 25-26, United Native American Telecommunications, Inc. at 16, TDS at 17, and Telephone Association of Michigan at 7.

[222] *See, e.g.*, comments of Telephone Electronics at 16, Iowa Network at 17-18, SBA at 11-12 (regarding small business consortia).

[223] In the context of gender preferences, we observe that the intermediate scrutiny standard applies whether or not the measure is used by Congress or the States. *See, e.g., Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1009 (3rd Cir. 1993).

that Congress enacted the provision in the interest of promoting economic opportunity for minorities and women, who are underrepresented in the communications industry. The commenters maintain that this is an important and legitimate congressional objective, and we agree.

291. Cook Inlet also observes that the congressional espousal of that stated objective in the auction statute is implicitly predicated on Congress' well-founded belief that minorities and women are underrepresented among business owners in the communications industry.[224] Similarly, UCC asserts that the provisions regarding female and minority preferences were enacted on the implicit understanding that women and minorities have been hindered from participation in the communications industry as a result of invidious discrimination. UCC notes that there are ample grounds for a legislative finding to that effect, citing the statement in *Metro* that Congress has consistently recognized the barriers encountered by minorities in entering the broadcast industry.[225] Murray and others also cite the SBAC Report as a compilation of evidence of the existence of current and historical barriers to minority participation in the telecommunications industry.[226] Cook Inlet, in addition, cites a 1982 House conference report and statements in the Congressional Record as grounds for such a finding and refers to an appendix listing reports and studies concerning minority underrepresentation in business and barriers to entry.[227] The Minority Business Enterprise Legal Defense and Education Fund, Inc. has submitted a copy of a massive report on racial discrimination in contracting in the telecommunications industry that it had previously presented to Congress.[228] Finally, Calcell Wireless, Inc. refers to information concerning systematic bias against African and Hispanic Americans by mortgage lenders.[229]

292. Similar arguments and information have been submitted in this record concerning women. AWRT points out that in *Califano v. Webster*, 430 U.S. 313, 317 (1977), the Supreme Court made clear that reduction in the disparity in economic condition between men and women caused by the long history of discrimination against women is an important governmental objective.[230] AWRT, Call-Her and Palmer Communications, Inc. refer to findings that women are statistically underrepresented among business owners in the SBAC Report, the 1992 Annual Report of the National Women's Business Council, and recent publications of the U.S. Department of Commerce.[231] Call-Her also notes that Congress made conclusive findings in the Women's Business Ownership Act of 1988, 15 U.S.C. § 631(h), that women are hindered in pursuit of entrepreneurial endeavors by sexual discrimination affecting their ability to raise capital and acquire managerial skills.[232]

293. These commenters, we believe, have offered persuasive arguments and evidence that any measures we may adopt to implement section 309(j)(4)(D) satisfy the "important governmental interest" aspect of the *Metro* intermediate scrutiny test. In this regard, many commenters point out that in *Metro* the Supreme Court concluded that a full appreciation of the legislative process counseled against a court limiting its analysis to the legislative history of the particular act under review.[233] Examined against this complete legislative backdrop, the record compiled herein indicates that Congress had a full understanding of the barriers to entry that have led to underrepresentation of minorities and women in the communications industry. Further, the commenters in this proceeding have submitted much additional evidence relating to this underrepresentation and the factors causing it.

294. In this regard, we note that, even under a standard of "strict scrutiny," it is not necessary to demonstrate government sponsored discrimination. Even where the government is only a passive participant in the discrimination to be remedied, the government may permissibly use race-based measures to redress discrimination committed by private parties within the government's jurisdiction. *See Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401, 1413 (9th Cir. 1991), *citing Richmond v. Croson*, 488 U.S. 467, 491-92; *O Donnell Construction Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J. concurring). Similarly, under the intermediate scrutiny standard as it has been applied to sex-based preferences, evidence of governmental discrimination against women is not required to establish the necessary important government interest. *Coral Construction Co. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991). Thus, to justify racial or gender preferences in the context of the auction law, it is unnecessary to demonstrate that the Federal government or the FCC has engaged in discriminatory practices in the allocation of licenses.

295. No commenter has alleged such governmental discrimination. Instead, the sorts of barriers to entry cited by commenters include discrimination in commercial lending practices that thwart entry by minorities and women into capital intensive industries such as communications and discriminatory contracting practices by communications companies against minority firms providing equipment and services in the telecommunications industry. The study submitted by the Minority Business Enterprise Legal Defense Fund indicates, moreover, that minority firms are willing and qualified to provide these services, but that discriminatory practices have hindered their opportunities for meaningful participation in the communications industry.

296. The *Metro* intermediate scrutiny standard also requires a determination that the remedial scheme is "substantially related" to the important governmental objective. For this purpose, the Commission must ensure that minority and gender-based preferences are not over-inclusive and are narrowly tailored to fulfill the statutory objec-

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224 Comments of Cook Inlet at 15.
225 Reply comments of UCC at 8.
226 *See* comments of George E. Murray at 7.
227 Comments of Cook Inlet at 11-15, *citing* H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982), 128 Cong. Rec. H8954 (daily ed. December 6, 1982), 131 Cong. Rec. H4981-83 (daily ed. June 28, 1985); *see also* comments of American Wireless at 13-15.
228 Comments of MBELDEF at 2, 60 and Appendix (Minority Business Legal Defense and Education Fund Report to the U.S. Congress, Discrimination Practices in the Telecommunications Industry (1993)).
229 Comments of CalCell at 23 n.36.
230 *See* comments of AWRT at 7.
231 *See id.* at 5-7, comments of Call-Her at 4-8, and Palmer at 5 (Reply).
232 Comments of Call-Her at 4-5.
233 *See* comments of Cook Inlet at 13, *citing Metro*, 497 U.S. at 572.

tive of ensuring economic opportunity for women and minorities. Several commenters maintain that the Commission can satisfy this standard by adopting eligibility rules that would ensure that only legitimate minority-owned firms could obtain the preferences and by adopting a waiver rule by which any set-aside spectrum blocks are released to general bidding if no qualified minorities apply to bid for them.[234] In the alternative, Cook Inlet recommends that if the Commission has constitutional concerns, it should limit preferences to firms that are socially or economically disadvantaged, according to definitional standards set forth in rules for the SBA's "section 8(a)" program.[235] Some commenters, such as Iowa Network, contend that set-asides for minority or female-owned businesses would be overinclusive if they were available to all such businesses regardless of their capital resources. Iowa Network argues in this regard that it would not serve the justifying purpose of promoting economic opportunity for the disadvantaged to confer preferential treatment on those who are already successful.[236] Similarly, BellSouth argues there is no evidence publicly-held companies controlled by females and minorities have suffered lack of economic opportunity and they should not be eligible for preferences.[237]

297. As discussed above in Section VI.E., we have adopted strict eligibility rules to ensure that only legitimate minority-owned and women-owned firms are eligible for preferences, and that such preferences are not over-inclusive and are narrowly tailored. For example, as suggested by some commenters, minority and women-owned entities must be owned and controlled by United States citizens since the record contains no evidence of discriminatory entry barriers for aliens. If, in the future, we decide that race or gender-based preferences are necessary, we shall determine then whether additional tailoring mechanisms should be adopted, such as those proposed by commenters.

VII. CONCLUSION, PROCEDURAL MATTERS AND ORDERING CLAUSES

298. As we stated in the Notice, the Commission is entering new and uncharted territory in this proceeding. The Commission is poised to unleash great potential to stimulate economic growth and create thousands of jobs for Americans by awarding thousands of new licenses. We believe that the decisions we have made in this Second Report and Order will significantly improve the efficiency of our licensing processes. We believe that these decisions promote the public policy objectives set forth by Congress, and that they will serve the Commission's goals of promoting economic growth and enhancing access to telecommunications service offerings for consumers, producers, and new entrants. Our competitive bidding system is designed to award licenses expeditiously and in a way that will encourage efficient spectrum use and promote competition for service provision. Finally, we believe that the menu of preferences we have adopted for designated entities will satisfy Congress's objective of ensuring diversity in the ownership and management of telecommunications facilities.

A. Final Regulatory Flexibility Analysis

299. Pursuant to the Regulatory Flexibility Act of 1980, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rule Making in PP Docket No. 93-253. Written comments on the IRFA were requested. The Commission's final analysis is as follows:

300. *Need for and purpose of the action.* This rulemaking proceeding was initiated to implement Section 309(j) of the Communications Act, as amended. The rules adopted herein will carry out Congress's intent to establish a system of competitive bidding for choosing from among mutually exclusive applications for initial licenses to use the electromagnetic spectrum principally for the transmission or reception of communications signals to or from subscribers for compensation. The rules adopted herein also will carry out Congress's intent to ensure that small businesses, rural telephone companies, and businesses owned by women and minorities are afforded an opportunity to participate in the provision of spectrum-based services.

301. *Issues raised in response to the IRFA.* The IRFA noted that the proposals under consideration in the NPRM included the possibility of new reporting and recordkeeping requirements for a number of small business entities. No commenters responded specifically to the issues raised in the IRFA. We have made some modifications to the proposed requirements as appropriate.

302. *Significant alternatives considered and rejected.* All significant alternatives have been addressed in the Second Report and Order.

B. Ordering Clauses

303. Accordingly, IT IS ORDERED that Part 1 of the Commission's Rules is amended as set forth in the attached Appendix B.

304. IT IS FURTHER ORDERED that the rules adopted herein WILL BECOME EFFECTIVE 30 days after publication in the Federal Register.[238] This action is taken pursuant to Sections 4(i), 303(r) and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r) and 309(j).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[234] *See, e.g.*, comments of Cook Inlet at 18-19, American Wireless at 18, and NAMTEC at 13.
[235] Comments of Cook Inlet at 39-40.
[236] *See* reply comments of Iowa Network at 8.
[237] *See* comments of BellSouth at 29, n.47.
[238] The Commission may conclude in subsequent Reports and Orders in this docket that specified procedural rules applicable to particular services should become effective upon publication in the Federal Register.

APPENDIX A

COMMENTS AND REPLY COMMENTS FILED IN PP DOCKET NO. 93-253

Comments

Advanced Mobilcomm Technologies, Inc., and Digital Spread Spectrum Technologies, Inc.

James Aidala

Oye Ajayi-Obe

Alcatel Network Systems, Inc. (Alcatel)

AllCity Paging, Inc. (AllCity)

Alliance for Fairness and Viable Opportunity (Alliance for Fairness)

Alliance of Rural Area Telephone & Cellular Service Providers (ARAT)

Alliance Telecom, Inc.

Alpine Electronics and Communication (Alpine)

American Automobile Association (AAA)

American Mobile Satellite Corp. (AMSC)

American Mobile Telecommunications Association (AMTA)

American Personal Communications (APC)

The American Petroleum Institute (API)

American Wireless Communication Corporation (AWCC or American Wireless)

American Women in Radio and Television, Inc. (AWRT)

Ameritech

AMSC Subsidiary Corporation

Anchorage Telephone Utility (Anchorage)

Charles N. Andreae/Andreae & Associates, Inc.

John G. Andrikopoulos, et al.

Arch Communications Group, Inc. (Arch Communications)

Association for Maximum Service Telecasters & National Association of Broadcasters (MSTV/NAB)

Association of American Railroads (AAR)

Association of America's Public Television Stations (APTS)

Association of Independent Designated Entities (AIDE)

Association of Public-Safety Communications Officials International, Inc. (APCO)

AT&T

Baraff, Koerner, Olender & Hochberg, P.C.

Bechtel & Cole

Bell Atlantic Personal Communications, Inc. (Bell Atlantic)

BellSouth Corp., BellSouth Telecommunications, Inc., BellSouth Cellular Corp., and Mobile Communications Corporation of America (BellSouth)

Jeffrey T. Bergner

Art Boroughs

Van R. Boyette

D.B. Branch

Quentin L. Breen

Dennis C. Brown and Robert H. Schwaninger (Brown and Schwaninger)

Cablevision Industries, Comcast Corp., Cox Cable Communications, and Jones Intercable, Inc.

Calcell Wireless, Inc. (Calcell)

California Microwave, Inc. (California Microwave)

California Public Utilities Commission (CPUC)

Call-Her, L.L.C. (Call-Her)

Capitol Hill Management

Catapult Communications (Catapult)

Cellular Communications, Inc. (CCI)

Cellular Service, Inc. (CSI)

Cellular Settlement Groups

Cellular Telecommunications Industry Association (CTIA)

Cencall Communications Corp. (Cencall)

Century Communications Corp. (Century)

CFW Communications Corp., Denver and Ephrata Tel. and Tel. Co., and Lexington Tel. Co.

Chase Communications Corp. (Chase)

The Chase McNulty Group, Inc. (Chase McNulty)

Chickasaw Telephone Company (Chickasaw)

Citizens Utility Company (Citizens)

Coalition for Equity in Licensing

Cole, Raywid & Braverman

Wendy C. Coleman d/b/a WCC Cellular (WCC Cellular)

Comcast Corporation (Comcast)

Comsat Corporation (Comsat)

ComTech Associates, Inc. (Comtech)

Converging Industries

Cook Inlet Region, Inc. (Cook Inlet)

Corporate Technology Partners (CTP)

Council of 100

Cox Enterprises, Inc. (Cox)

Thomas Crema

Data Link Communications (Data Link)

Devsha Corporation

Dial Page, Inc.

Steven L. Dickerson

Abby Dilley

Diversified Cellular Communications (Diversified)

Domestic Automation Company (Domestic Automation)

Laura G. Dooley

John Dudinsky

Mark H. Duesenberg

John R. Duesenberg

Duncan, Weinberg, Miller & Pembroke, P.C.

Economics and Technology, Inc.

FiberSouth, Inc. (FiberSouth)

First Cellular of Maryland

Firstcom, Inc.

Fisher, Wayland, Cooper and Leader (Fisher Wayland)

David F. Gencarelli, Esq.

Janet B. Gencarelli

General Communications, Inc. (GCI or General Communications)

GEOTEK Industries, Inc. (GEOTEK)

Debra Gervasini

Martin Charles Gleyier

GTE Services Corp. (GTE)

GVNW, Inc./Management (GVNW)

John G. Heard

Hughes Communications Galaxy, Inc. & DirecTv, Inc. (DirecTv)

Hughes Transportation Management Systems (Hughes)

Independent Cellular Consultants

Independent Cellular Network, Inc.

Industrial Telecommunications Association, Inc.

Intelligent Vehicle-Highway Society of America

Interdigital Communications Corporation (Interdigital)

Iowa Network Services, Inc. (Iowa Network)

IVHS America

JAJ Cellular

Thomas J. Jasien

JBS & Associates/Shrader Real Estate

JMP Telecom Systems, Inc.

Andrea J. Johnson

Edward M. Johnson

E.F. Johnson Company

Jeff Johnston

Clair Joyce

Abraham Kye, et al.

Ward Leber & Eroca Daniel

Michael Lewis

Liberty Cellular, Inc. d/b/a Kansas Cellular (Liberty Cellular)

Lightcom International, Inc. (Lightcom)

Daniel R. Lindemann

Loral Qualcomm Satellite Services, Inc. (Loral)

Robert Lutz, et al.

Walter Lowman

LuxCel Group, Inc. (LuxCel)

John J. Mandler

McCaw Cellular Communications, Inc. (McCaw)

MCI Telecommunications Corporation (MCI)

MEBTEL, Inc.

Mercury Communications, L.C. (Mercury)

Millin Publications, Inc. (Millin)

Minnesota Equal Access Network Services, Inc. (Minnesota Equal Access)

Minority Business Enterprise Legal Defense and Education Fund, Inc. (MBELDEF)

Minority PCS Coalition (Transworld Telecommunications Inc., Progressive Communications, Inc., Carl and Gail Davis and John Washington)

Motorola, Inc. (Motorola)

Motorola Satellite Communications, Inc. (Motorola Satcom)

George E. Murray

MW TV, Inc.

Law Offices of Richard S. Myers (Richard S. Myers)

National Association of Black-Owned Broadcasters, Inc. (NABOB)

National Association of Business and Educational Radio, Inc. (NABER)

National Association of Minority Telecommunications Executives and Companies (NAMTEC)

National Rural Telecom Association (NRTA)

National Telecommunications and Information Administration of the U.S. Department of Commerce (NTIA)

National Telephone Cooperative Association (NTCA)

Nextel Communications, Inc. (Nextel)

NYNEX Corporation (NYNEX)

M. Kathleen O Conner

Organization for the Protection and Advancement of Small

Telephone Companies (OPASTCO)

Pacific Bell and Nevada Bell (PacBell)

Pacific Telecom Cellular, Inc. (Pacific Telecom Cellular)

PacTel Corporation (PacTel)

PacTel Paging and MidContinent Media (Joint Comments) (PacTel Paging)

PageMart, Inc. (PageMart)

Paging Network, Inc. (PageNet)

Palmer Communications, Inc. (Palmer)

Michael Pernecke

Raegene Pernecke

Personal Communications Network Services of New York

Jeffrey Peterson

Phase One Communications, Inc. (Phase One)

David Pines

PMN, Inc. (PMN)

PNC Cellular, Inc.

Point Communications Company (Point)

Primosphere Limited Partnership (Primosphere)

Quick Call Group (Quick Call)

Radio Telecom and Technology, Inc. (RTT)

RAM Mobile Data USA Limited Partnership (RAM)

RAY Communications, Inc.

Michael R. Rickman

Roamer One, Inc. (Roamer One)

Rochester Telephone Corp.

Rocky Mountain Telecommunications Association and Western Rural Telephone Association

Rural Cellular Association

Rural Cellular Corp.

Rural Electrification Administration, U.S. Department of Agriculture (REA)

Rural Telephone Company

Thomas Salmon

Santarelli, Smith & Carroccio

Michael Sauls

Securicor PMR Systems, Ltd. (Securicor)

Stephan C. Sloan

Small Business PCS Association

Small RSA Operators

Small Telephone Companies of Louisiana

Laquita Smallwood

Southwestern Bell Corporation (Southwestern Bell)

Sprint Corporation (Sprint)

Henry J. Staudinger

James F. Stern

Arlene F. Strege

Suite 12 Group

Systems Engineering, Inc.

Taxpayers Assets Project

Telephone and Data Systems, Inc. (TDS)

Telephone Association of Michigan (TAM)

Telephone Electronics Corp. (Telephone Electronics)

Telepoint Personal Communications, Inc (Telepoint).

The Telmarc Group and Telmarc Telecommunications, Inc. (Telmarc)

Telocator -- The Personal Communications Industry Association (Telocator)

Thumb Cellular Limited Partnership (Thumb)

Time Warner Telecommunications (Time Warner)

Tri-State Radio Company (Tri-State)

TRW, Inc. (TRW)

Unique Communications Concepts (Unique)

United Native American Telecommunications, Inc.

U.S. Intelco Networks, Inc.

U.S. Small Business Administration -- Chief Counsel for Advocacy (SBA)

U.S. Small Business Administration -- Associate Administrator for Procurement Assistance

U.S. Telephone Association (USTA)

Utilities Telecommunications Council (UTC)

Valley Management, Inc.

L. Brennan Van Dyke

Vanguard Cellular Systems, Inc. (Vanguard)

Richard L. Vega Group (Vega)

Venus Wireless, Inc. (Venus)

Leslie R. Walls

Western Wireless, Inc.

Windsong Communications, Inc. (Windsong)

Wireless Cable Association International, Inc.

Wireless Services Corporation (Wireless)

Wisconsin Wireless Communications Corporation (Wisconsin Wireless)

Ann Bradshaw Woods

William E. Zimsky

Reply Comments

Marlene Abe

Robert B. Adams (Commissioner, Office of General Services, State of New York)

Alcatel Network Systems, Inc.

AllCity Paging, Inc.

American Paging, Inc.

American Personal Communications

American Wireless Communication Corporation, Inc.

American 52 East

AMTECH Corporation (AMTECH)

John G. Andrikopoulos, Bent Elbow Corporation, et al.

Apex Welding, Inc. (Apex)

Arch Communications, Inc.

The Association of American Railroads

Association of Independent Designated Entities

AT&T

Bob Atkison

Bell Atlantic Personal Communications, Inc.

BellSouth Corporation

John L. Bergin

Kenneth B. Blair, Robert B. Blow, et al.

Town of Bridgewater, MA

Hayo Broeis

Cable & Wireless, Inc.
R. Jeffrey Cale
Robert R. Cale
Call-Her, L.L.C.
Capp Systems (IVDS) Inc.
Cellular Service, Inc.
Cellular Settlement Groups (Joint Comments)
Cellular Telecommunications Industry Association
CFW Communications Co., Denver and Ephrata Tel. and Tel. Co., and Lexington Tel. Co.
The Chillicothe Telephone Company
Citizens Utility Company
Edward Cline
Coalition for Equity in Licensing
Columbia Cellular Corporation
Comcast Corporation
Community Service Telephone Company
Cook Inlet Region, Inc.
DeKalb Telephone Cooperative, Inc.
Dell Telephone Cooperative, Inc.
Vernon L. Dennis
Dial Page, Inc.
Diversified Cellular Communications, Inc.
Michael J. Dowling
Ellipsat Corporation (Ellipsat)
Enakee Partnership
Marie S. Essex
Clemente S. Estrera, Jr.
Euro-Tech Enterprises, Inc.
Federal IVD
Fisher, Wayland, Cooper and Leader
Four Color Imports, Ltd. (Four Color)
Orren W. Fricke
Marguerite Geckler
General Communications, Inc. (GCI)
Genesis Investments
George Gower
GTE Service Corp.
Gulf Telephone Company
Mark D. Hafermann
Timothy Hartley
Dr. Renee Harwick
John G. Herd
Nathan D. Hodges
Troy Hodges
Home Box Office (HBO)
Adrian Hubbell
Hughes Communications Galaxy, Inc. and DirecTv, Inc.
Hughes Transportation Management Systems
Icon Communications Services
Independent Cellular Consultants (ICC)
Industrial Containers, Inc.
Industrial Telecommunications Association, Inc.
The Institute for Public Representation, Georgetown University Law Center, and Office of Communication of the United Church of Christ (Joint Comments) (UCC)
The Interagency Group
Interior Telephone Co.
International Small Satellite Organization
Iowa Network Services, Inc.
Cecil W. King
Kingswood Associates
Bernd K. L. Klopfer
J. Koyasako
Kuruvilla M. Kurien
Mani A. Kurien
Sosa Kurien
J. Bruce Llwellyn
Local Area Telecommunications, Inc.
Long Lines, Ltd.
Loral Qualcomm Satellite Services, Inc.
Manti Telephone Company
McCaw Cellular Communications, Inc.
McElroy Electronics Corporation
MCI Telecommunications Corporation
Metricom, Inc.
Marshall L. Morgan
William G. Morgan
Motorola, Inc.
Motorola Satellite Communications, Inc.
Mountain Home Publishing
Mukluk Telephone Co.
George E. Murray
National Association of Business and Educational Radio, Inc.
National Cable Television Association, Inc.
National Public Radio
National Rural Telephone Association
National Telephone Cooperative Association
Nextel Communications, Inc.
North American Interactive Partners I-IV
NYNEX Corporation
J.W. Oakes
Omnipoint Communications, Inc. (Omnipoint)

Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Joseph A. Orlando
P & P Investments
Pacific Bell and Nevada Bell
Pacific Traders Group
PacTel Corporation
PacTel Paging and Midcontinent Media
PageMart, Inc.
Paging Network, Inc.
Palmer Communications, Inc.
PAN, Inc.
William W. Perry
Personal Network Services Corporation
Sidney E. Pinkston
Emma M. Pinkston
Pinpoint Communications, Inc.
PN Cellular, Inc. and its affiliates
PNM, Inc.
Price Communications Cellular
Denis A. Radefeld
Radiofone, Inc.
RAM Mobile Data USA Limited Partnership
Recourse Spectrum
Roamer One, Inc.
Roberts County Telephone Cooperative Association
Rochester Telephone Corporation
Rural Cellular Association
Ryberg Properties
Saco River Telegraph and Telephone Company
James J. Schneider
H.M. Schwartz
John Sheppard
Crystal Smith
Southwestern Bell
Spacedrive, Inc.
Sprint Corporation
David G. Stanley
Harry Stevens, Jr.
Sonia Stuart
Suite 12 Group
David F. Swain & Co.
Telephone and Data Systems, Inc.
Telephone Electronics Corporation
Telocator -- The Personal Communications Industry Association
William W. Thorton
Randy A. Toyoshima
TRW, Inc. (TRW)
Unique Communications Concepts
U.S. Intelco Networks, Inc.
United States Telephone Association
US West
The University of Texas System
Utilities Telecommunications Council
WCC Cellular
Bob Weber
Greg Winters
Wunschel Law Firm

APPENDIX B

FINAL RULES

Part 1 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 1, 4(i), 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 151, 154, and 303, unless otherwise noted.

2. Part 1 is amended by adding a new subpart (Q) to read as follows:

Subpart Q - Competitive Bidding Proceedings

AUTHORITY: 47 U.S.C. 309(j).

GENERAL PROCEDURES

§ 1.2101 Purpose

The provisions of this subpart implement Section 309(j) of the Communications Act of 1934, as added by the Omnibus Budget Reconciliation Act of 1993 (P.L. 103-66), authorizing the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive applications for certain initial licenses.

§ 1.2102 Eligibility of Applications for Competitive Bidding

(a) Mutually exclusive initial applications in the following services or classes of services are subject to competitive bidding:

(1) Interactive Video Data Service (*see* 47 C.F.R. Part 95, Subpart F);

(2) Marine Public Coast Stations (*see* 47 C.F.R. Part 80, Subpart J);

(3) Multipoint Distribution Service and Multichannel Multipoint Distribution Service (*see* 47 C.F.R. Part 21, Subpart K). This subsection does not apply to applications in these services that were filed prior to July 26, 1993;

(4) Exclusive Private Carrier Paging above 900 MHz (*see* 47 C.F.R. Part 90, Subpart P and the Private Carrier Paging Exclusivity Report and Order, 8 FCC Rcd 8318 (1993));

(5) Public Mobile Services (*see* 47 C.F.R. Part 22), except in the 800 MHz Air-Ground Radiotelephone Service, and in the Rural Radio Service. This subsection does not apply to certain applications in the cellular radio service that were filed prior to July 26, 1993;

(6) Specialized Mobile Radio Service (SMR) (*see* 47 C.F.R. Part 90, Subpart S) including finder's preference requests for frequencies allocated to the SMR service (*see* 47 C.F.R. Section 90.173); and

(7) Personal Communications Services (PCS) (*see* 47 C.F.R. Part 24).

NOTE: To determine the rules that apply to competitive bidding in the foregoing services, specific service rules should also be consulted.

(b) The following types of license applications are not subject to competitive bidding procedures:

(1) Applications for renewal of licenses;

(2) Applications for modification of license; provided, however, that the Commission may determine in particular instances that applications for modification that are mutually exclusive with other applications should be subject to competitive bidding;

(3) Applications for subsidiary communications services. A "subsidiary communications service" is a class of service where the signal for that service is indivisible from that of the main channel signal and that main channel signal is exempt from competitive bidding under other provisions of these rules. *See, e.g.,* § 1.2102(c) (exempting broadcast services). Examples of such subsidiary communications services are those transmitted on subcarriers within the FM baseband signal (*see* 47 C.F.R. § 73.295), and signals transmitted within the Vertical Blanking Interval of a broadcast television signal; and

(4) Applications for frequencies used as an intermediate link or links in the provision of a continuous, end-to-end service where no service is provided directly to subscribers over the frequencies. Examples of such intermediate links are (i) point-to-point microwave facilities used to connect a cellular radio telephone base station with a cellular radio telephone mobile telephone switching office and (ii) point-to-point microwave facilities used as part of the service offering in the provision of telephone exchange or interexchange service.

(c) Applications in the following services or classes of services are not subject to competitive bidding:

(1) Alaska-Private Fixed Stations (*see* 47 C.F.R. Part 80, Subpart O);

(2) Broadcast radio (AM and FM) and broadcast television (VHF, UHF, LPTV) under 47 C.F.R. Part 73;

(3) Broadcast Auxiliary and Cable Television Relay Services (*see* 47 C.F.R. Part 74, Subparts D, E, F, G, H and L and Part 78, Subpart B);

(4) Instructional Television Fixed Service (*see* 47 C.F.R. Part 74, Subpart I);

(5) Maritime Support Stations (*see* 47 C.F.R. Part 80, Subpart N);

(6) Marine Operational Fixed Stations (*see* 47 C.F.R. Part 80, Subpart L);

(7) Marine Radiodetermination Stations (*see* 47 C.F.R. Part 80, Subpart M);

(8) Personal Radio Services (*see* 47 C.F.R. Part 95), except applications filed after July 26, 1993, in the Interactive Video Data Service (*see* 47 C.F.R. Part 95, Subpart F);

(9) Public Safety, Industrial/Land Transportation, General and Business Radio categories above 800 MHz, including finder's preference requests for frequencies not allocated to the SMR service (*see* 47 C.F.R. Section 90.173), and including, until further notice of the Commission, the Automated Vehicle Monitoring Service (*see* 47 C.F.R. § 90.239);

(10) Private Land Mobile Radio Services between 470-512 MHz (*see* 47 C.F.R. Part 90, Subparts B-F) including finder's preference requests, *see* 47 C.F.R. Section 90.173;

(11) Private Land Mobile Radio Services below 470 MHz (*see* 47 C.F.R. Part 90, Subparts B-F) except in the 220 MHz band (*see* 47 C.F.R. Part 90, Subpart T), including finder's preference requests (*see* 47 C.F.R. Section 90.173); and

(12) Private Operational Fixed Services (*see* 47 C.F.R. Part 94).

§ 1.2103 Competitive Bidding Design Options

(a) The Commission will select the competitive bidding design(s) to be used in auctioning particular licenses or classes of licenses on a service-specific basis. The Commission will choose from one or more of the following types of auction designs for services or classes of services subject to competitive bidding:

(1) Single round sealed bid auctions (either sequential or simultaneous)

(2) Sequential oral auctions

(3) Simultaneous multiple round auctions

(b) The Commission may use combinatorial bidding, which would allow bidders to submit all or nothing bids on combinations of licenses, in addition to bids on individual licenses. The Commission may require that to be declared the high bid, a combinatorial bid must exceed the sum of the individual bids by a specified amount. Combinatorial bidding may be used with any type of auction.

(c) The Commission may use single combined auctions, which combine bidding for two or more substitutable licenses and award licenses to the highest bidders until the available licenses are exhausted. This technique may be used in conjunction with any type of auction.

§ 1.2104 Competitive Bidding Mechanisms

(a) *Sequencing.* The Commission will establish the sequence in which multiple licenses will be auctioned.

(b) *Grouping.* In the event the Commission uses either a simultaneous multiple round competitive bidding design or combinatorial bidding, the Commission will determine which licenses will be auctioned simultaneously or in combination.

(c) *Reservation Price.* The Commission may establish a reservation price, either disclosed or undisclosed, below which a license subject to auction will not be awarded.

(d) *Minimum Bid Increments.* The Commission may, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

(e) *Stopping Rules.* The Commission may establish stopping rules before or during multiple round auctions in order to terminate the auctions within a reasonable time.

(f) *Activity Rules.* The Commission may establish activity rules which require a minimum amount of bidding activity.

(g) *Withdrawal, Default and Disqualification Penalties.* As specified below, when the Commission conducts a simultaneous multiple round auction pursuant to § 1.2103, the Commission will impose penalties on bidders who withdraw high bids during the course of an auction, or who default on payments due after an auction closes or who are disqualified.

(1) Bid withdrawal prior to close of auction. A bidder who withdraws a high bid during the course of an auction will be subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission. No withdrawal penalty would be assessed if the subsequent winning bid exceeds the withdrawn bid. This penalty amount will be deducted from any upfront payments or down payments that the withdrawing bidder has deposited with the Commission.

(2) Default or disqualification after close of auction. If a high bidder defaults or is disqualified after the close of such an auction, the defaulting bidder will be subject to the penalty in subsection (1) plus an additional penalty equal to three (3) percent of the subsequent winning bid. If the subsequent winning bid exceeds the defaulting bidder's bid amount, the 3 percent penalty will be calculated based on the defaulting bidder's bid amount. These amounts will be deducted from any upfront payments or down payments that the defaulting or disqualified bidder has deposited with the Commission.

When the Commission conducts single round sealed bid auctions or sequential oral auctions, the Commission may modify the penalties to be paid in the event of bid withdrawal, default or disqualification; provided, however, that such penalties shall not exceed the penalties specified above.

(h) *Bidder identification during auctions.* During any auction, the Commission may identify bidders and the bids only by bid numbers.

(i) The Commission may delay, suspend, or cancel an auction in the event of a natural disaster, technical obstacle, evidence of security breach, unlawful bidding activity, administrative necessity, or for any other reason that affects the fair and efficient conduct of the competitive bidding. The Commission also has the authority, at its sole discretion, to resume the competitive bidding starting from the beginning of the current or some previous round or cancel the competitive bidding in its entirety.

§ 1.2105 Bidding Application and Certification Procedures; "Prohibition of Collusion

(a) *Submission of Short Form Application (FCC Form 175).* In order to be eligible to bid, an applicant must timely submit a short-form application (FCC Form 175), together with any appropriate filing fee set forth by Public Notice. Unless otherwise provided by Public Notice, the Form 175 need not be accompanied by an upfront payment (*see* Section 1.2106 of this (part).

(1) All Form 175s will be due:

(i) on the date(s) specified by Public Notice; or

(ii) in the case of application filing dates which occur automatically by operation of law (*see, e.g.,* 47 C.F.R. Section 22.902), on a date specified by Public Notice after the Commission has reviewed the applications that have been filed on those dates and determined that mutual exclusivity exists.

(2) The Form 175 must contain the following information:

(i) Identification of each license on which the applicant wishes to bid;

(ii) The applicant's name, if the applicant is an individual. If the applicant is a corporation, then the short-form application will require the name and address of the corporate office and the name and title of an officer or director. If the applicant is a partnership, then the application will require the name, citizenship and address of all partners, and, if a partner is not a natural person, then the name and title of a responsible person should be included as well. If the applicant is a trust, then the name and address of the trustee will be required. If the applicant is none of the above, then it must identify and describe itself and its principals or other responsible persons;

(iii) The identity of the person(s) authorized to make or withdraw a bid;

(iv) If the applicant applies as a designated entity pursuant to § 1.2110 of these rules, a statement to that effect and a declaration, under penalty of perjury, that the applicant is qualified as a designated entity under § 1.2110 of the Commission's Rules;

(v) Certification that the applicant is legally, technically, financially and otherwise qualified pursuant to Section 308(b) of the Communications Act of 1934, as amended;

(vi) Certification that the applicant is in compliance with the foreign ownership provisions of Section 310 of the Communications Act of 1934, as amended;

(vii) Certification that the applicant is and will, during the pendency of its application(s), remain in compliance with any service-specific qualifications applicable to the licenses on which the applicant intends to bid including, but not limited to, financial qualifications. The Commission may require certification in certain services that the applicant will, following grant of a license, come into compliance with certain service-specific rules, including, but not limited to, ownership eligibility limitations;

(viii) An exhibit, certified as truthful under penalty of perjury, identifying all parties with whom the applicant has entered into partnerships, joint ventures, consortia or other agreements, arrangements or understandings of any kind relating to the licenses being auctioned, including any such agreements relating to the post-auction market structure. All such arrangements must have been entered into prior to the filing of Form 175 and no such arrangements may be entered into after the filing of Form 175 until after the winning bidder has made the required down payment;

(ix) Certification under penalty of perjury that it has not entered and will not enter into any explicit or implicit agreements, arrangements or understandings of any kind with any parties other than those identified pursuant to subsection (viii) regarding the amount of their bids, bidding strategies or the particular licenses on which they will or will not bid;

NOTE: The Commission may also request applicants to submit additional information for informational purposes to aid in its preparation of required reports to Congress.

(b) *Modification and Dismissal of Form 175.*

(1) Any Form 175 that is not signed or otherwise does not contain all of the certifications required pursuant to this section is unacceptable for filing and cannot be corrected subsequent to any applicable filing deadline. The application will be dismissed with prejudice and the upfront payment, if paid, will be returned.

(2) The Commission will provide bidders a limited opportunity to cure defects specified herein (except for failure to sign the application and to make certifications) and to resubmit a corrected application. Form 175 may be amended or modified to make minor changes or correct minor errors in the application (such as typographical errors). The Commission will classify all amendments as major or minor, pursuant to rules applicable to specific services. An application will be considered to be a newly filed application if it is amended by a major amendment and may not be resubmitted after applicable filing deadlines.

(3) Applicants who fail to correct defects in their applications in a timely manner as specified by Public Notice will have their applications dismissed with no opportunity for resubmission.

(c) *Prohibition of Collusion.* After the filing of short-form applications, all bidders are prohibited from cooperating, collaborating, discussing or disclosing in any manner the substance of their bids or bidding strategies with other bidders until after the high bidder makes the required down payment, unless such bidders are members of a bidding consortium or other joint bidding arrangement identified on the bidder's short-form application.

§ 1.2106 Submission of Upfront Payments

(a) The Commission may require applicants for licenses subject to competitive bidding to submit an upfront payment. In that event, the amount of the upfront payment and the procedures for submitting it will be set forth in a Public Notice. No interest will be paid on upfront payments. In auctions for licenses set aside pursuant to § 1.2110(c), the Commission may establish lower upfront payments for eligible designated entities.

(b) Upfront payments must be made either by wire transfer or by cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission.

(c) If an upfront payment is not in compliance with the Commission's Rules, or if insufficient funds are tendered to consititute a valid upfront payment, the applicant shall have a limited opportunity to correct its submission to bring it up to the minimum valid upfront payment prior to the auction. If the applicant does not submit at least the minimum upfront payment, it will be ineligible to bid, its application will be dismissed and any upfront payment it has made will be returned.

(d) The upfront payment(s) of a bidder will be credited toward any down payment required for licenses on which the bidder is the high bidder.

(e) Notwithstanding the provisions of subsection (d), in the event a penalty is aessed pursuant to § 1.2104 for bid withdrawal or default, upfront payments or down payments on deposit with the Commission will be used to satisfy the bid withdrawal or default penalty before being applied toward any additional payment obligations that the high bidder may have.

§ 1.2107 Submission of Down Payment and Filing of Long-Form Applications

(a) After bidding has ended, the Commission will identify and notify the high bidder and declare the bidding closed.

(b) Within five (5) business days after being notified that it is a high bidder on a particular license(s), a high bidder must submit to the Commission's lockbox bank such additional funds (the "down payment") as are necessary to bring its total deposits (not including upfront payments applied to satisfy penalties) up to twenty (20) percent of its high bid(s). (In single round sealed bid auctions conducted under § 1.2103, however, bidders may be required to submit their down payments with their bids.) This down payment must be made by wire transfer or cashier's check drawn in U.S. dollars from a financial institution whose deposits are insured by the Federal Deposit Insurance Corporation and must be made payable to the Federal Communications Commission. Winning bidders who are qualified designated entities eligible for installment payments under § 1.2110(d) are only required to bring their total deposits up to ten (10) percent of their winning bid(s). Such designated entities must pay the remainder of the twenty (20) percent down payment within five (5) business days of grant of their application. *See* § 1.2110(e)(1) and (2) of this subpart. Down payments will be held by the Commission until the high bidder has been awarded the license and has paid the remaining balance due on the license, in which case it will not be returned, or until the winning bidder is found unqualified to be a licensee or has defaulted, in which case it will be returned, less applicable penalties. No interest will be paid on any down payment.

(c) A high bidder that meets its down payment obligations in a timely manner must, within ten (10) business days after being notified that it is a high bidder, submit an additional application (the "long-form application") pursuant to the rules governing the service in which the applicant is the high bidder (unless it has already submitted such an application, as contemplated by § 1.2105(a)(1)(b). For example, if the applicant is a high bidder for a license in the Interactive Video Data Service (*see* 47 C.F.R. Part 95, Subpart F), the long form application will be submitted on FCC Form 574 in accordance with Section 95.815 of the Rules. Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, high bidders need not submit an additional application filing fee with their long-form applications. Notwithstanding any other provision in Title 47 of the Code of Federal Regulations to the contrary, the high bidder's long-form application must be mailed or otherwise delivered to:

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554
Attention: Auction Application Processing Section

An applicant that fails to submit the required long-form application as required under this subsection, and fails to establish good cause for any late-filed submission, shall be deemed to have defaulted and will be subject to the penalties set forth in § 1.2104 of the Commission's Rules.

(d) As an exhibit to its long-form application, the applicant must provide a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangment it had entered into relating to the competitive bidding process prior to the time bidding was completed. Such agreements must have been entered into prior to the filing of short-form applications pursuant to § 1.2105.

§ 1.2108 Procedures for Filing Petitions To Deny Against Long-Form Applications

(a) Where petitions to deny are otherwise provided for under the Act or the Commission's Rules, and unless other service-specific procedures for the filing of such petitions are provided for elsewhere in the Commission's Rules, the procedures in this section shall apply to the filing of petitions to deny the long-form applications of winning bidders.

(b) Within thirty (30) days after the Commission gives public notice that a long-form application has been accepted for filing, petitions to deny that application may be filed. Any such petitions must contain allegations of fact supported by affidavit of a person or persons with personal knowledge thereof.

(c) An applicant may file an opposition to any petition to deny, and the petitioner a reply to such opposition. Allegations of fact or denials thereof must be supported by affidavit of a person or persons with personal knowledge thereof. The times for filing such opposition and replies will be those provided in § 1.45 of these Rules.

(d) If the Commission determines that:

(1) an applicant is qualified and there is no substantial and material issue of fact concerning that determination, it will grant the application.

(2) an applicant is not qualified and that there is no substantial issue of fact concerning that determination, the Commission need not hold an evidentiary hearing and will deny the application.

(3) substantial and material issues of fact require a hearing, it will conduct a hearing. The Commission may permit all or part of the evidence to be submitted in written form and may permit employees other than administrative law judges to preside at the taking of written evidence. Such hearing will be conducted on an expedited basis.

§ 1.2109 License Grant, Denial, Default, and Disqualification

(a) Unless otherwise specified in these rules, auction winners are required to pay the balance of their winning bids in a lump sum within five (5) business days following award of the license. Grant of the license will be conditioned on full and timely payment of the winning bid.

(b) If a winning bidder withdraws its bid after the Commission has declared competitive bidding closed or fails to remit the required down payment within five (5) business

days after the Commission has declared competitive bidding closed, the bidder will be deemed to have defaulted, its application will be dismissed, and it will be liable for the default penalty specified in § 1.2104(g)(2). In such event, the Commission may either re-auction the license to existing or new applicants or offer it to the other highest bidders (in descending order) at their final bids. The down payment obligations set forth in § 1.2107(b) will apply.

(c) A winning bidder who is found unqualified to be a licensee, fails to remit the balance of its winning bid in a timely manner, or defaults or is disqualified for any reason after having made the required down payment, will be deemed to have defaulted and will be liable for the penalty set forth in § 1.2104(g)(2). In such event, the Commission will conduct another auction for the license, affording new parties an opportunity to file applications for the license.

(d) Bidders who are found to have violated the antitrust laws or the Commission's rules in connection with their participation in the competitive bidding process may be subject, in addition to any other applicable sanctions, to forfeiture of their upfront payment, down payment or full bid amount, and may be prohibited from participating in future auctions.

§ 1.2110 Designated Entities

(a) Designated entities are small businesses, businesses owned by members of minority groups and/or women, and rural telephone companies.

(b) Definitions.

(1) Small businesses. Unless otherwise provided in rules governing specific services, a small business is an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.

(2) Businesses owned by members of minority groups and/or women. A business owned by members of minority groups and/or women is one in which minorities and/or women who are U.S. citizens have at least 50.1 percent equity ownership and 50.1 percent controlling interest in the applicant. For applicants that are limited partnerships, the general partner must be a minority and/or woman who is a U.S. citizen (or an entity 100 percent owned by minorities and/or women who are U.S. citizens) that owns at least 50.1 percent of the partnership equity. The interests of minorities and women are to be calculated on a fully-diluted basis; agreements such as stock options and convertible debentures shall be considered to have a present effect on the power to control an entity and shall be treated as if the rights thereunder already have been fully exercised. However, upon a demonstration that options or conversion rights held by non-controlling principals will not deprive the minority and female principals of a substantial financial stake in the venture or impair their rights to control the designated entity, a designated entity may seek a waiver of the requirement that the equity of the minority and female principals must be calculated on a fully-diluted basis. The term minority includes individuals of African American, Hispanic-surnamed, American Eskimo, Aleut, American Indian and Asian American extraction.

(3) Rural telephone companies. A rural telephone company is an independently owned and operated local exchange carrier with 50,000 access lines or fewer, and serving communities with 10,000 or fewer inhabitants.

(c) The Commission may set aside specific licenses for which only eligible designated entities, as specified by the Commission, may bid.

(d) The Commission may permit small businesses, including small businesses owned by women and minorities and rural telephone companies that qualify as small businesses, that are high bidders for licenses specified by the Commission, to pay the full amount of their high bids in installments over the term of their licenses pursuant to the following:

(1) Unless otherwise specified, each eligible applicant paying for its license(s) on an installment basis must deposit by wire transfer or cashier's check in the manner specified in § 1.2107(b) sufficient additional funds as are necessary to bring its total deposits to ten (10) percent of its winning bid(s) within five (5) business days after the Commission has declared it the winning bidder and closed the bidding. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(2) Within five (5) business days of the grant of the license application of a winning bidder eligible for installment payments, the licensee shall pay another ten (10) percent of the high bid, thereby commencing the eligible licensee's installment payment plan. Failure to remit the required payment will make the bidder liable to pay penalties pursuant to § 1.2104(g)(2).

(3) Upon grant of the license, the Commission will notify each eligible licensee of the terms of its installment payment plan. Such plans will:

(i) impose interest based on the rate of U.S. Treasury obligations (with maturities closest to the duration of the license term) at the time of licensing;

(ii) allow installment payments for the full license term;

(iii) begin with interest-only payments for the first two years; and

(iv) amortize principal and interest over the remaining term of the license.

(4) A license granted to an eligible entity that elects installment payments shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan.

(i) If an eligible entity making installment payments is more than ninety (90) days delinquent in any payment, it shall be in default.

(ii) Upon default or in anticipation of default of one or more installment payments, a licensee may request that the

Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, the licensee's financial condition, and whether the licensee is seeking a buyer under an authorized distress sale policy. If the Commission grants a request for a grace period, or otherwise approves a restructured payment schedule, interest will continue to accrue and will be amortized over the remaining term of the license.

(iii) Following expiration of any grace period without successful resumption of payment or upon denial of a grace period request, or upon default with no such request submitted, the license will automatically cancel and the Commission will initiate debt collection procedures pursuant to Part 1, Subpart O of the Commission's Rules.

(e) The Commission may award bidding credits (*i.e.*, payment discounts) to eligible designated entities.

(1) Competitive bidding rules applicable to individual services will specify the designated entities eligible for bidding credits, the licenses for which bidding credits are available, the amounts of bidding credits and other procedures.

(2) Any bidding credit for rural telephone companies will be available only for licenses in rural telephone company service areas and only if eligible rural telephone companies make an infrastructure build-out commitment beyond any standard performance requirement. The amount of the bidding credit for rural telephone companies will be based on the amount by which eligible applicants agree to expand or accelerate the build-out commitment. If a rural telephone company fails to meet an accelerated or expanded build-out commitment, it must make payment to the Commission within ninety (90) days of a penalty equal to the amount of the bidding credit. Grant of the license will be conditioned upon payment of this penalty if and when it becomes applicable.

(f) The Commission may offer designated entities a combination of the available preferences or additional preferences.

§ 1.2111 Assignment or transfer of control: unjust enrichment

(a) *Reporting requirement.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license within three years of receiving a new license through a competitive bidding procedure must, together with its application for transfer of control or assignment, file with the Commission a statement indicating that its license was obtained through competitive bidding. Such applicant must also file with the Commission the associated contracts for sale, option agreements, management agreements, or other documents disclosing the total consideration that the applicant would receive in return for the transfer or assignment of its license. This information should include not only a monetary purchase price, but also any future, contingent, in-kind, or other consideration (*e.g.*, management or consulting contracts either with or without an option to purchase; below market financing).

(b) *Unjust enrichment payment: set-asides.* As specified in this subsection, an applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor pursuant to a set-aside for eligible designated entities under § 1.2110(c) of the Commission's Rules, or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, must seek Commission approval and may be required to make an unjust enrichment payment (Payment) to the Commission by cashier's check or wire transfer before consent will be granted. The Payment will be based upon a schedule that will take account of the term of the license, any applicable construction benchmarks, and the estimated value of the set-aside benefit, which will be calculated as the difference between the amount paid by the designated entity for the license and the value of a comparable non-set-aside license in the free market at the time of the auction. The Commission will establish the amount of the Payment and the burden will be on the applicants to disprove this amount. No Payment will be required if:

(1) the license is transferred or assigned more than five years after its initial issuance; or

(2) the proposed transferee or assignee is an eligible designated entity under § 1.2110(c) of the Commission's Rules, and so certifies.

(c) *Unjust enrichment payment: installment financing.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor through a competitive bidding procedure utilizing installment financing available to designated entities under § 1.2110(d) of the Rules will be required to pay the full amount of the remaining principal balance as a condition of the license transfer. No payment will be required if the proposed transferee or assignee assumes the installment payment obligations of the transferor or assignor, and if the proposed transferee or assignee is itself qualified to obtain installment financing under § 1.2110(d) of the Rules, and so certifies.

(d) *Unjust enrichment payment: bidding credits.* An applicant seeking approval for a transfer of control or assignment (otherwise permitted under the Commission's Rules) of a license acquired by the transferor or assignor through a competitive bidding procedure utilitizing bidding credits available to eligible designated entities under § 1.2110(e) of the Rules, or who proposes to take any other action relating to ownership or control that will result in loss of status as an eligible designated entity, must seek Commission approval and will be required to make an unjust enrich-

ment payment (Payment) to the government by wire transfer or cashier's check before consent will be granted. The Payment will be the sum of the amount of the bidding credit plus interest at the rate applicable for installment financing in effect at the time the license was awarded. *See* § 1.2110(e). No payment will be required if:

(1) the proposed transferee or assignee is an eligible designated entity under § 1.2110(e) of the Commission's Rules, and so certifies; or

(2) the proposed transferor or assignor is a rural telephone company as defined in § 1.2110(b)(3) of the Rules, and the proposed transferee or assignee is also a rural telephone company and agrees to meet the same construction requirements as the transferor or assignor.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RESERVESMART, INC.,
Complainant,

v. File No. E-91-97

MCI TELECOMMUNICATIONS CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1994; Released: May 27, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. We have before us a formal complaint filed by ReserveSmart, Inc., ("RSI") against MCI Telecommunications Corporation ("MCI"). RSI alleges that MCI's practice of charging RSI's 800 number account for interstate calls for which MCI could not provide identifying information and its subsequent disconnection of RSI's telephone service for non-payment of 800 service charges were unjust and unreasonable under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b).[1] RSI seeks a Commission order declaring MCI's actions to be unlawful and awarding RSI monetary damages.[2] MCI has denied the allegations and has moved to dismiss the complaint.[3] For the reasons discussed below, we deny RSI's complaint.

II. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. The record reflects that RSI purchased 800 services from MCI between 1988 and 1989 in the states of Connecticut and Indiana.[4] The dispute in this matter centers around RSI's claim that MCI routinely charged it for calls that MCI claims were made to RSI's 800 number even though MCI could not "identify the calls" when requested by RSI.[5] Although RSI does not, in its complaint and subsequent pleadings, specify or elaborate on what it means by "identify the calls," it appears that RSI is referring to MCI's failure to provide the ten digit automatic number identification (ANI) for calls placed to RSI's 800 number from non-equal access end offices. RSI also claims, without reference to underlying facts or supporting documentation, that MCI improperly refused to consider its claims for credits for unidentified calls and improperly disconnected RSI's telephone service for non-payment of the disputed charges.[6] RSI contends that as a result of MCI's actions, it has paid MCI for services that it did not receive, lost business revenues and suffered harm to its reputation.[7]

3. MCI makes two principal arguments to support its contention that RSI's complaint should be dismissed for failure to state a claim under the Communications Act. First, MCI asserts that the gravamen of RSI's complaint, that it is charging RSI for calls that were never delivered to RSI, is completely unfounded.[8] According to MCI, its switches automatically record calls to 800 numbers transmitted by the local exchange carrier (LEC), and MCI's billing system then generates a billing record based on the call record generated by the MCI switch.[9] MCI states that the fact that the MCI switch records the call transmitted by the LEC is proof that the call occurred.[10]

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[1] Section 201(b) provides in pertinent part that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, or classification that is unjust and unreasonable is ... unlawful."

[2] RSI's complaint stems from a federal district court action brought by MCI against RSI in the Northern District of Indiana, South Bend Division, to collect unpaid charges. On June 13, 1990, under the doctrine of primary jurisdiction, the court ordered that the "... issue raised by RSI in its affirmative defenses and counterclaims as to whether [MCI's] practice of charging RSI's 800 number account for calls from telephone numbers which MCI cannot identify is just and reasonable be referred to the Federal Communications Commission for decision." MCI Telecommunications Corporation v. ReserveSmart, Inc., Case No. S90-00010 (June 13, 1990). RSI filed the instant complaint to place the matter before the Commission on May 2, 1991.

[3] MCI filed an answer and a motion to dismiss the complaint on July 5, 1991. MCI has also filed a motion to strike RSI's objection to its motion to dismiss, filed by RSI on September 18, 1991, as untimely under the Commission's rules. In the interest of obtaining a full record in this matter, we deny MCI's motion to strike and accept RSI's objection to MCI's motion to dismiss into the record.

[4] In July 1988, RSI moved its business offices from Stanford, Connecticut to Elkhart, Indiana. Complaint at 3.

[5] *Id.*

[6] *Id.* at 4-5.

[7] *Id.*

[8] *See* MCI's Motion to Dismiss at 2.

[9] *See* Affidavit of Robert Woodrow Traylor, a senior staff member who MCI states is responsible for analyzing the technical terms and conditions regarding the purchase of exchange access from access providers.

[10] *Id.* at 3-4. According to MCI,

> Calls received at MCI switches through LEC provided access from non-equal access end offices contain an 'OOY' code as part of the 800 number dialed by the calling party. The OOY code is a LEC industry method of identifying calls from non-equal access areas for 800 calls. The calls have the '800' portion of the call replaced with the OOY code which identifies the specific LEC switch from which the call originated. These calls are recorded by MCI switches in exactly the same manner as calls containing ANI except the ANI portion of the call is not populated in the call record. In MCI's billing system, the OOY code, which is recorded as part of the call record, is associated with the LEC switch in order to determine the geographic region from which the call originated.

4. Second, MCI contends that it is neither required to furnish, nor capable of, providing the identifying information that RSI seeks.[11] According to MCI, it is capable of delivering ANI to its 800 service customers only when 800 calls are placed from within "equal access areas" or locations inside LEC serving areas that are technically capable of furnishing access to caller locations equivalent to that furnished the American Telephone and Telegraph Company (AT&T) by its former affiliates, the Bell Operating Companies. In addition, MCI states that it is required by LECs to purchase access through so-called LATA tandem switches that provide 800 access from non-equal access end offices.[12] MCI further states that the tariffs that define the relationship between MCI and the LECs clearly state that caller ANI is not delivered to MCI when calls are placed from within non-equal access areas.[13] Thus, MCI contends, because its inability to deliver certain ANI information to RSI is reflected in both its tariff and the tariffs of its suppliers, there is no basis for concluding that MCI has violated the Communications Act or any Commission rule or order.

III. DISCUSSION

5. Initially, we note that neither party sought any discovery in this proceeding, nor did the complainant respond to a request issued by the staff to both parties to provide additional information and arguments in support of their claims.[14] After careful review of the limited record developed in this matter, we find no basis for a ruling that MCI violated Section 201(b) of the Act as alleged in the complaint.

6. It is well established that in a formal complaint proceeding pursuant to Section 208 of the Act,[15] the complainant has the burden of proof.[16] The crux of the case presented by RSI is its bare claim that MCI's practice of charging for 800 service calls that it cannot identify by calling number forced RSI to pay for services that it did not receive. RSI does not provide evidence or arguments to support its claim that it paid for calls never placed to its 800 number, nor does it cite any Commission or court precedent that would support a determination that a carrier's failure to identify an 800 call by calling number is *per se* unreasonable within the meaning of Section 201(b) of the Act.[17] Indeed, RSI makes no attempt whatsoever to refute evidence and arguments presented by MCI to show: (1) that bills to RSI generated by MCI's billing system accurately reflect charges for calls placed to RSI's 800 number and (2) that MCI is not required to provide the caller identification requested by RSI. Therefore, in the absence of any persuasive showing by RSI that it was charged for calls that were not made or that MCI's failure to provide the requested information was unjust and unreasonable within the meaning of Section 201(b), we deny RSI's complaint.[18]

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended 47 U.S.C. § 154(i) and 208, and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaint filed by ReserveSmart, Inc., IS DENIED.

8. IT IS FURTHER ORDERED that MCI's motion to strike RSI's objection to its motion to dismiss IS DENIED.

9. IT IS FURTHER ORDERED that MCI's motion to dismiss RSI's complaint IS DISMISSED as moot.

10. IT IS FURTHER ORDERED that the Chief, Formal Complaints and Investigations Branch, shall send a copy of this Order to the Honorable Allen Sharp, Justice of the United States District Court, Northern District of Indiana, South Bend Division.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief
Common Carrier Bureau

Id., note 5, RSI does not allege in its complaint that any of the disputed telephone calls were placed within equal-access areas. *See also* Affidavit of Robert Woodrow Traylor.

[11] *Id.* at 4.

[12] *See* MCI Motion to Dismiss at 4, citing The Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Section 6.2.5(A), 2nd Revised Page 179.1.

[13] MCI adds that its Tariff F.C.C. No. 1, Section C 3.0863 discloses that caller ANI is deliverable only when 800 calls are placed from equal access areas. MCI Motion to Dismiss at 5.

[14] *See* Letter from Renee Terry, Commission Counsel, dated April 29, 1992. MCI responded to the staff's request on May 13, 1992 by submitting the Affidavit of Robert Woodrow Traylor.

[15] 47 U.S.C. § 208.

[16] *See* Amendment of Rules Concerning Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, 8 FCC Rcd 2614, 2616-2617 (1993). *See also, e.g.*, Connecticut Office of Consumer Counsel v. AT&T Communications, 4 FCC Rcd 8130, 8133 (1989), *aff'd sub nom., Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991).

[17] RSI has not cited any specific rule, policy or order of the Commission that would require MCI to provide the type of information RSI requests under the circumstances described in the complaint.

[18] MCI also argues that the complaint should be dismissed for failure to state a claim. We disagree. Allegations that a common carrier has engaged in a billing practice that requires a customer to pay for interstate calls that were never placed would be sufficient in any case to state a cause of action under Title II of the Act, 47 U.S.C. §§ 201 *et seq.* Our decision in the instant case is that RSI has failed to sustain its burden of proof, not that it has failed to present a proper claim.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Moran Communications, Inc., against Telemedia, Inc. CSR-4137-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 1994; Released: May 27, 1994

By the Chief, Cable Services Bureau:

1. On October 14, 1993, a "Petition for Special Relief" was filed with the Commission on behalf of Moran Communications, Inc. ("Moran"), licensee of Low Power Television Station W20AT, Roanoke Rapids, North Carolina, claiming that Telemedia, Inc. ("Telemedia"), had refused to carry W20AT's signal on its Lawrenceville, Virginia, cable system after Moran had requested mandatory carriage. Moran states that it sent to Telemedia a letter demanding carriage on August 20, 1993, but a timely response was not received. In its petition, Moran seeks an order from the Commission requiring Telemedia to commence carriage of Station W20AT. This petition is unopposed.

2. Pursuant to §614(a) of the Communications Act of 1934, as amended, a cable system's signal carriage obligation includes carriage of "qualified" low power television (LPTV) stations in certain limited circumstances. *See* 47 U.S.C. §534(a); 47 C.F.R. §76.56(b)(3). A LPTV station that conforms to the rules established for LPTV stations in part 74 of the Commission's rules will be considered "qualified" only if: (1) it broadcasts for at least the minimum number of hours of operation required for full power television stations under part 73 of the rules; (2) it adheres to Commission requirements regarding nonentertainment programming and employment practices;[1] (3) it complies with interference regulations consistent with its secondary status pursuant to 47 C.F.R. Part 74; (4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; (5) the community of license of the station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas (MSAs) as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and (6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system. *See* 47 U.S.C. § 534(h)(2); 47 C.F.R. § 76.55(d).

3. In its petition, Moran asserts that Station W20AT is a low power station licensed to serve Roanoke Rapids, North Carolina, which meets the requirements under Part 74 of the Commission's rules. Moran states that W20AT operates 24 hours per day, seven days per week and meets all obligations under Part 73 of the rules regarding the broadcast of nonentertainment programming, programming and rates involving political candidates, election issues, controversial issues of public importance, editorials and personal attacks, programs for children and equal employment opportunity. Moran asserts the station's compliance with the interference regulations imposed under Part 74 of the Commission's rules. Moran claims that Station W20AT is located 31.3 miles from Telemedia's principal headend and delivers to it a good quality over-the-air signal. Both Roanoke Rapids and Lawrenceville are located outside of the largest 160 Metropolitan Statistical Areas (MSAs) as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on that date was 15,722. Moran contends that there is no full power television broadcast station licensed to any community within Brunswick County, the county served by the cable system. In addition, Moran asserts that Station W20AT addresses news and informational needs that are not being adequately served by any full power television broadcast station, and attributes this to the distance of the station's community of license from other full service broadcast stations.

4. Under certain limited circumstances enunciated in the Commission's rules, cable systems with more than 12 usable activated channels are required to carry low power television stations on their lineups.[2] Stations with 35 or fewer usable activated channels that have not filled the channels set aside for local commercial television stations must carry one "qualified" low power television station. 47 U.S.C. §534(c)(1); 47 C.F.R. § 76.56(b)(3). Stations with more than 35 usable activated channels that have not filled the channels set aside for local commercial television stations must carry two "qualified" low power television stations. *Id.* Moran asserts that Telemedia's cable system in Lawrenceville, Virginia, has 22 activated channels. Accordingly, it must set aside at least seven channels on the system for the carriage of local commercial television stations. In its petition, Moran states that the Lawrenceville system is currently carrying four commercial television stations located in the Richmond ADI, fewer than its maximum number of local commercial television stations. As a result, the Commission's rules require Telemedia to carry one qualified low power television station.

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[1] Section 614(h)(2)(B) provides that the LPTV station must meet "all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission [must] determine[] that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast stations because of the geographic distance of such full power stations from the low power station's community of license." 47 U.S.C. § 534 (h)(2)(B); 47 C.F.R. § 76.55(d).

[2] Section 76.56(b)(2) provides that "[a] cable system with more than 12 usable activated channels, as defined in Section 76.5(oo), shall carry local commercial television stations up to one-third of the aggregate number of usable activated channels of such system."

5. We find that W20AT is a qualified low power television station. Accordingly the petition filed on October 14, 1993, by Moran Communications, Inc., IS GRANTED in accordance § 614(c)(1) of the Communications Act, 47 U.S.C. § 534(c)(1), and Telemedia, Inc., IS ORDERED to commence carriage of low power television station W20AT forty-five (45) days from the release date of this Order. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Central Missouri State University against Friendship Cable of Missouri — CSR-3960-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 1994; Released: May 27, 1994

By the Chief, Cable Services Bureau:

1. On July 8, 1993, Central Missouri State University ("CMSU"), licensee of KMOS-TV, Sedalia, Missouri, filed a complaint against Friendship Cable of Missouri ("Friendship Cable"), pursuant to Section 615 of the Communications Act, 47 U.S.C. § 535. CMSU requests that the Commission order Friendship Cable to carry KMOS-TV on Friendship Cable's cable system serving Niangua Bridge, Missouri, and that KMOS-TV be carried on Channel 6. On August 18, 1993, Buford Television, Inc. ("Buford"), filed an opposition to CMSU's complaint.[1] On September 7, 1993, CMSU filed a reply.

2. Section 615 of the Communications Act of 1934, as amended, requires a cable system to carry the signals of qualified local noncommercial educational television stations.[2] *See* 47 U.S.C. § 535. A cable operator shall not be required, however, to carry the signal of any qualified local noncommercial educational television system which does not deliver to the cable system's principal headend a signal of good quality or baseband video signal. *See* 47 U.S.C. § 535(g)(4). Because the cable operator is in the best position to know whether a given noncommercial educational station is providing a good quality signal to the system's principal headend, we believe that the initial burden of demonstrating the lack of a good quality signal appropriately falls on the cable operator. In meeting this burden, the cable operator must show that it has used good engineering practices, as defined below, to measure the signal delivered to the headend.

3. With respect to the standard to be used to determine what constitutes a "good quality" signal, we note that the 1992 Cable Act failed to set a standard for either VHF or UHF noncommercial stations. However, the 1992 Cable Act did adopt a standard for determining the availability of VHF and UHF commercial stations at a cable system's headend. To establish the availability of a VHF commercial station's signal, the 1992 Cable Act set out a standard of -49 dBm at a cable system's headend. A standard of -45 dBm was established for UHF commercial station signals. Consistent with Congress' guidance with respect to VHF and UHF commercial station availability, we see no reason not to utilize the same standards as *prima facie* tests to initially determine, absent other evidence, whether VHF or UHF noncommercial stations place adequate signal levels over a cable system's principal headend.

4. In its Complaint, CMSU asserts that KMOS-TV is a qualified local noncommercial educational television station and therefore it has the right to carriage on Friendship Cable's Niangua Bridge, Missouri, cable system.[3] CMSU states that although Friendship Cable has not responded to CMSU's request for the geographic location of the principal headend of Friendship Cable's Niangua Bridge cable system, CMSU "infer[s] that the headend is located at or near Niangua Bridge, the location of which is within KMOS-TV's Grade-B broadcast area."

5. In response, Friendship Cable notes in its opposition that its initial determination of KMOS-TV's eligibility for must-carry was that the system was not within the 50-mile zone from KMOS-TV's point of reference. *See* 47 C.F.R. § 76.55(b). It states that its cable systems are on the edge of KMOS-TV's Grade B contour and the 50-mile zone. Since the complaint was filed, however, Buford's engineer conducted field intensity surveys which show that the signal level at each headend site is less than the acceptable levels required by the Commission's rules regarding signal quality, and that, therefore, KMOS-TV does not qualify for carriage.

6. In its reply, CMSU notes that Buford still has not supplied information concerning the geographic coordinates and the off-air broadcast stations carried by Friendship Cable's Niangua Bridge system. CMSU also asserts that the field survey analysis conducted by Buford did not include periodic measurements of the signal; did not indicate the orientation of the reception antenna used to measure KMOS-TV's signal; was not dated; and, that the antenna was purportedly placed at 40-feet high on the tower at Niangua Bridge. CMSU alleges that Buford is not using the same, standard reception practices to obtain KMOS-TV's signal as it uses to obtain off-air signals from the Columbia/Jefferson City and Springfield areas, and that, therefore, the KMOS-TV signal was not tested using the same engineering practices used to receive and process other off-air broadcast signals.

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[1] Friendship Cable is owned by Buford Television, Inc.

[2] A television station that is licensed by the Commission as a noncommercial educational television station and is owned and operated by a public agency, nonprofit foundation, corporation or association that is eligible to receive a community service grant from the Corporation for Public Broadcasting will be considered a qualified noncommercial educational television station. *See* 47 U.S.C. § 535(l)(1)(A); 47 C.F.R. § 76.55(a)(1). A local qualified noncommercial educational television station is a qualified noncommercial educational television station that is licensed to a community whose reference point is within 50 miles of the principal headend of the cable system; or, whose Grade B service contour encompasses the principal headend of the cable system. *See* 47 U.S.C. § 535(l)(2); 47 C.F.R. § 76.55(b).

[3] CMSU maintains that KMOS-TV is licensed as a noncommercial television station; it is owned by the Board of Regents at Central Missouri State University, a public agency operating under the laws of the state of Missouri; it is eligible to receive a community service grant from the Corporation for Public Broadcasting; and, its Grade B service contour encompasses the entire municipality of Niangua Bridge, Missouri.

7. Although Friendship Cable never submitted the geographic location of its principal headend, we will assume that KMOS-TV's signal meets the definition of "local" in 47 C.F.R. § 76.55(b). CMSU has stated its belief that KMOS-TV meets the definition of local. Further, Friendship Cable notes that although it initially determined that Niangua Bridge's reference point was not within 50 miles of the cable system's principal headend, it later concluded that its cable system is "on the edge" of KMOS-TV's Grade B contour and the 50-mile zone.[4]

8. We find that Friendship Cable has not met its burden of demonstrating the lack of a good quality signal because it has not shown that it has used standard engineering practices. To determine whether a certain level of signal is present, it is necessary to submit a series of measurements, not just one. Generally, if the test results are less than -55 dBm for a VHF station, at least four readings must be taken over a two-hour period. Where the initial readings are between -55 dBm and -49 dBm, inclusive, the readings should be taken over a 24-hour period, with measurements no more than 4 hours apart to establish reliable test results. In addition to the information required by our rules to be furnished to the affected station when there is a dispute over signal level measurements, *see* 47 C.F.R. § 76.61, cable operators are expected to employ sound engineering measurement practices. Signal strength surveys, therefore, should include, at a minimum, the following: 1) specific make and model numbers of the equipment used, as well as its age and most recent date(s) of calibration; 2) description(s) of the characteristics of the equipment used, such as antenna ranges and radiation patterns; 3) height of the antenna above ground level and whether the antenna was properly oriented; and 4) weather conditions and time of day when the tests where done. When measured against these criteria, the data submitted by Friendship Cable is insufficient to demonstrate that KMOS-TV's signal is not of "good quality" at the cable system's headend. *See, e.g., Complaint of Channel 5 Public Broadcasting, Inc. against WestStar Cable*, CSR-3799-M, DA-93-896 (released July 23, 1993).

9. CMSU has submitted a December 23, 1992 letter which it sent to Friendship Cable requesting carriage on Channel 6. According to Section 615(g)(5), a qualified local noncommercial educational station carried pursuant to must-carry requirements must appear on the cable system channel number on which it is broadcast over-the-air, or on the channel on which it was carried on July 19, 1985, at the election of the station, or on such other channel as is mutually agreed upon by the station and the cable operator. 47 U.S.C. § 535(g)(5); 47 C.F.R. § 76.57(b). Because CMSU has elected that KMOS-TV be carried on its over-the-air channel, Channel 6, we will grant its request that the Commission order Friendship Cable to carry KMOS-TV on Channel 6.

10. In view of the above, the complaint filed on July 8, 1993 by Central Missouri State University, licensee of KMOS-TV, Sedalia, Missouri (CSR-3960-M) IS GRANTED, in accordance with Section 615(j)(3) of the Communications Act of 1934, as amended, (47 U.S.C. § 535). Furthermore, Friendship Cable of Missouri IS ORDERED to commence carriage of KMOS-TV on Channel 6 within forty-five (45) days from the release date of this *Order* on its system serving Niangua Bridge, Missouri, unless Friendship Cable submits, to the Commission and to CMSU, within fifteen (15) days of the release date of this *Order*, the engineering data required herein to support Friendship Cable's assertion of poor signal quality from KMOS-TV at Friendship Cable's principal headend.[5] This action is taken by the Deputy Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

[4] Friendship Cable apparently does not dispute that KMOS-TV's Grade B service contour encompasses the principal headend of the cable system.

[5] We believe that 15 days is sufficient time for Friendship Cable to perform the required tests. Guidance regarding what constitutes standard engineering practices has been available since July 23, 1993. *See Channel 5 Public Broadcasting, Inc., supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Broadcasting Company, Inc. — File No. CSG-93-125-(6)-ML

Applications for Authority to Modify the Licenses of Six Temporary-Fixed Ku-band Earth Stations to Add the INTELSAT and Anik Satellite Systems for the Transmission of Television Signals Between the Continental United States and Points Within Alaska, Hawaii, U.S. Territories and Possessions

ORDER ON RECONSIDERATION

Adopted: May 12, 1994; Released: May 27, 1994

By the Chief, International Facilities Division:

1. On January 21, 1994, a Memorandum Opinion, Order and Authorization was adopted in the above-captioned matter in which we partially granted National Broadcasting Company, Inc.'s (NBC's) applications to modify the licenses of six of its Ku-band domestic temporary-fixed transmit earth station facilities (Call Signs E920144, E900504, E870839, E920143, E870838, and E890799).[1] We modified the licenses of these earth stations to add the INTELSAT satellite system as a point of communication for transmission of television program material and related communications to points within the continental United States from American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Northern Marianna Islands, Palmyra Atoll and Wake Island. Subsequently, pursuant to Section 1.106 of the Commission's Rules, NBC and GE American Communications, Inc. (GE Americom) jointly filed a petition for reconsideration requesting that Johnston Atoll be removed as a point of communication. For the reasons discussed below, we grant their petition.

2. In our order partially granting NBC's applications, we found that the Commission generally requires U.S. earth station operators to use domestic space station facilities for domestic services. We stated, however, that in certain circumstances, such as the unavailability of domestic facilities, we permit such operators to access INTELSAT and other countries' satellites for domestic services. We found that the South Pacific areas listed in NBC's application are not served by U.S. domestic satellites and therefore may be properly served by use of the INTELSAT system.

3. NBC and GE Americom have now presented satellite contour data which shows that Johnston Atoll is served by SATCOM satellites of GE Americom's domestic satellite system. In light of this information, we grant NBC's and GE Americom's request that Johnston Atoll be removed from the list of authorized points from which NBC's earth stations may access INTELSAT.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.106 of the Commission's Rules, that NBC's and GE Americom's petition for reconsideration IS GRANTED.

5. IT IS FURTHER ORDERED that, pursuant to Section 309 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, the Memorandum Opinion, Order & Authorization partially granting applications File No. CSG-93-125-(6)-ML, 9 FCC Rcd 557 , DA 94-70 (released February 1, 1994) IS MODIFIED at paragraph 7 to state that the licenses of NBC's domestic temporary-fixed transmit earth station facilities call signs E920144, E900504, E870839, E920143, E870838, and E890799 are modified to add the INTELSAT satellite system as a point of communication for transmission of television program material and related communications to points within the continental United States from American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Kingman Reef, Midway Islands, Northern Marianna Islands, Palmyra Atoll and Wake Island.

6. IT IS FURTHER ORDERED that all other particulars of the original grant of these applications remain the same.

7. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *Memorandum Opinion, Order & Authorization*, 9 FCC Rcd 557, DA 94-70 (released February 1, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

R&R Media Corporation against Tele-Media Company of Western Connecticut — CSR-4128-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1994; Released: May 27, 1994

By the Chief, Cable Services Bureau:

1. On September 13, 1993, a "Complaint" was filed with the Commission on behalf of R&R Media Corporation ("R&R"), licensee of commercial UHF television station WTWS-TV (Independent, Channel 26), New London, Connecticut, claiming that Tele-Media Company of Western Connecticut ("Tele-Media") had refused to carry station WTWS's signal on its cable system, which serves parts of the New York and Hartford-New Haven ADIs (Area of Dominant Influence). R&R claimed that because station WTWS is located within the Hartford-New Haven ADI, Tele-Media is required to carry WTWS's signal, as provided for under the Commission's mandatory carriage rules. On October 5, 1993, an "Answer" was filed on behalf of Tele-Media, disputing R&R's contention that Tele-Media is required to carry WTWS's signal. Tele-Media claims that because it faces potentially increased copyright royalty liability by carrying WTWS's "distant" signal, R&R must indemnify Tele-Media for this additional liability prior to Tele-Media's grant of carriage to WTWS.

2. On June 16, 1993, the station manager of WTWS, by letter, requested carriage on Tele-Media's cable system on either channel 26 or channel 2. Because New London was recently added by the Commission to the Hartford-New Haven-New Britain-Waterbury market, as designated under the List of Major Television Markets (47 C.F.R. § 76.51), WTWS believed that it was entitled, under the Commission's must-carry rules, to carriage on all cable systems, including Tele-Media's, serving those communities named in this particular Connecticut market. Subsequently, in telephone conversations with the WTWS station manager, representatives from Tele-Media expressed concern about possible increased copyright liability resulting from the carriage of WTWS's "distant" signal on its system. The WTWS station manager attempted to allay this concern by forwarding a letter (Exhibit No. 3 to R&R's Complaint) to Tele-Media from the Assistant General Counsel at the U.S. Copyright Office, which stated that ". . . the Office will not question the addition of New London to the [Hartford-New Haven-New Britain-Waterbury] Connecticut market" and that ". . . the Office will not question the designation of WTWS as a 'local' broadcast signal in statements of account filed by cable systems serving the market." R&R's counsel, in a supplemental correspondence (Exhibit No. 4 to R&R's Complaint), further advised Tele-Media that the Commission's rules clearly required the carriage of WTWS on those systems operating in the Hartford-New Haven ADI, regardless of Tele-Media's integrated service in other ADIs and that any increased copyright liability is solely the responsibility of Tele-Media. Tele-Media responded by letter (Exhibit No. 5 to R&R's Complaint), stating that even if the Copyright Office determined that WTWS was a "local" signal for the Connecticut portion of its cable system, Tele-Media would still face additional copyright liability because its cable system operated in not only the Hartford-New Haven ADI, but also in the New York ADI. Tele-Media stated that it would not carry WTWS unless the station indemnified Tele-Media for a predicted increase in copyright liability.

3. In determining whether WTWS is eligible for mandatory carriage on Tele-Media's cable system, the Commission must address two interrelated, but distinct questions. First, is WTWS a "distant" or "local" signal for copyright purposes with respect to any portion of Tele-Media's cable system? Secondly, if WTWS is entitled to mandatory carriage and also is properly designated as a "distant" signal in all or some of Tele-Media's service areas, may Tele-Media demand indemnification prior to granting WTWS carriage on its cable system for the carriage of WTWS's "distant signal"?

4. Under the Copyright Act, a cable system may carry a "local" commercial television station without incurring additional copyright liability. *See* 17 U.S.C. § 111. A station is considered "local," for copyright purposes, if it ". . . is entitled to insist upon its signal being retransmitted by a cable system pursuant to the rules, regulations, and authorizations of the Federal Communications Commission in effect on *April 15, 1976* (emphasis added). . ." 17 U.S.C. § 111(f). Under these rules, a station is deemed "local" if, *inter alia*, the community in which it is licensed is located within 35 miles of a named community in a hyphenated television market (*i.e.*, a market identified on the List of Major Television Markets). *See* 47 C.F.R. § 76.61(a)(1) (1976). Therefore, because New London is not within 35 miles of the other named cities of the Connecticut hyphenated market, the first issue to be determined in this proceeding is whether the Commission's recent addition of New London to the Hartford-New Haven-New Britain-Waterbury hyphenated television market, as listed in § 76.51 of the Commission's rules, makes station WTWS's signal "local," for copyright purposes, in any of Tele-Media's service areas.

5. The Copyright Office has specifically questioned the Commission's assumption that it would automatically utilize any future changes made by the Commission to the List of Major Television Markets (either in terms of renaming or of reordering them) for copyright purposes. *See Notice of Inquiry in Docket No. RM 93-5*, 58 Fed. Reg. 34594, 34596 (dated June 28, 1993). In this same *Notice*, the Copyright Office stated that it ". . . is now considering the effect on the cable compulsory license of the Commission's three renamed markets, as well as the expected impact of future redesignation and reordering." *Id.* at 34595-96. In addition, the Copyright Office posed the following query for comment: "If the Copyright Office accepts the redesignations in Ohio, Connecticut, and Georgia for copyright purposes, should the Office accept any future redesignations? Should such acceptance be as a matter of course or should it be on a case-by-case basis?" *Id.* at 34596. Insofar as the redesignation of the Hartford-New

Haven-New Britain-Waterbury market to include also New London, the Copyright Office made the following decision specifically temporary: " *Pending the conclusion of this proceeding* (emphasis added), the Copyright Office will not question the designation of local signal status based on the FCC's action to rename one or more of the major television markets." *Id.* If the Copyright Office does not ultimately accept the Commission's addition of New London to the Hartford-New Haven-New Britain-Waterbury television market, as governing its administration of the copyright law, WTWS may not be considered a "local" signal, for copyright purposes, in any portion of Tele-Media's service area that is more than 35 miles from New London.

6. Section 614 of the Communications Act of 1934, as amended, requires cable systems to carry the signals of local commercial television stations. *See* 47 U.S.C. § 534(a); 47 C.F.R. § 76.56(b). Section 614(h)(1) of the Communications Act, as amended, defines a local commercial television station as any full power television station, other than a qualified local noncommercial educational television station, licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is located within the same ADI as the cable system. See 47 U.S.C. § 534(h)(1)(A); 47 C.F.R. § 76.55(c). The definition of a local commercial television station excludes, however, any television station that would be considered a "distant" signal under 17 U.S.C. § 111 (the Copyright Act), unless such station agrees to indemnify the cable operator for any increased liability resulting from its carriage on the cable system. See 47 U.S.C. § 534(h)(1)(B)(ii); 47 C.F.R. § 76.55(c)(2). An otherwise qualified must-carry local commercial television station that is a "distant" signal is not entitled to carriage unless it agrees to indemnify the cable operator for any additional copyright liability due to the carriage of its signal on the cable system. As indemnification, the Commission has stated that,

> [I]t is reasonable for a cable operator to receive a written commitment from a broadcaster that ensures that the payments will be made once the actual amount of copyright liability is determined. In return, we [the Commission] find it fair to require a cable operator to provide the broadcaster with an estimate of the expected copyright liability based on previous payments and financial information.

Report and Order in MM Docket 92-259, 8 FCC Rcd 2965, 2993 (1993).

7. Because station WTWS is located within the Hartford-New Haven ADI (as determined by reference to Arbitron's 1991-92 *Television Market Guide)* and Tele-Media's system serves that area, WTWS is entitled to carriage on that portion of Tele-Media's cable system located in the relevant ADI, but only if it agrees to indemnify Tele-Media for its increased copyright liability attributable to the carriage of WTWS's signal.[1] See 47 U.S.C. § 534(b); 47 C.F.R. § 76.56(b). Due to the fact that the Copyright Office has not yet conclusively determined if WTWS's signal will be considered "local," for copyright purposes, with respect to the New London portion of the Hartford-New Haven-New Britain-Waterbury hyphenated market, Tele-Media may demand indemnification from R&R for carriage of WTWS on any portion of its system that is not located within the New London specified zone,[2] prior to granting WTWS carriage on its system and until the Copyright Office has clearly indicated its position on this subject. *See* 47 U.S.C. § 534(h)(1)(B)(ii); 47 C.F.R. § 76.55(c)(2). In other words, Tele-Media may demand indemnification for additional copyright liability incurred because of its carriage of WTWS's "distant" signal in those areas served by its system that are located more than 35 miles from New London (*i.e.*, outside of WTWS's specified zone). Therefore, contrary to WTWS's claims, it is apparent that Tele-Media's carriage of WTWS on some or all portions of its cable system (regardless of their location in Connecticut or New York) may result in additional copyright liability, for which indemnification may be demanded by Tele-Media as a prerequisite to its carriage of WTWS.

8. R&R's assertion that Tele-Media is solely liable for any additional copyright liability due to the carriage of WTWS on its system is incorrect. Section 614 of the Communications Act, as amended, clearly provides that Tele-Media is not required to carry a station that would be considered "distant" under the cable compulsory copyright license unless that station agrees to indemnify the cable operator for any increased copyright liability resulting from its carriage. *See* 47 U.S.C. § 534(h)(1)(B)(ii); 47 C.F.R. § 76.55(c)(2). A cable system that operates in more than one ADI is allowed to segregate its signal to ensure that only "local" signals are carried by the system in their proper ADIs, but it is not required to do so if it is not technically feasible. *See Report and Order in MM Docket 92-259*, 8 FCC Rcd at 2976-77. "However, if the cable system is not able to alter its channel line-up on a community-by-community basis and the system straddles two ADIs, all broadcast stations in both ADIs will be considered 'local' for must-carry purposes." *Id.* at 2977. This does not mean that broadcast stations will be considered "local" for copyright purposes. Instead, this clarification was issued by the Commission to ensure that eligible must-carry broadcast stations could not be wholly excluded from carriage by cable systems that operate in more than one ADI. It was not

[1] There appears to be some confusion over the proper source for determining a local broadcast station's Area of Dominant Influence under the must-carry provisions of the Commission's rules. We would like to make clear that the List of Major Television Markets found at Section 76.51 of the Commission's rules, although relevant to the copyright portion of this dispute, is not equivalent to the Arbitron ADI designations. Section 76.55(e) of the Commission's rules provides that Arbitron's *Television Market Guide* is the source to be used to determine a local commercial television station's ADI for purposes of the mandatory carriage rules. The List of Major Television Markets is used by the Copyright Office to determine any copyright liability associated with the Commission's must-carry rules. Because of the Commission's use of Arbitron's *Television Market Guide* and the Copyright Office's use of the List of Major Television Markets, a broadcast station may have must-carry rights on cable systems operating in a particular ADI or multiple ADIs, but also be a "distant" signal, for copyright purposes, with respect to certain areas served by the cable systems that grant carriage. At the same time, a broadcast station may be a "local" signal, for copyright purposes, with respect to a particular cable system's service area, but not entitled to mandatory carriage on that system.

[2] The specified zone includes all communities located within a thirty-five (35) mile radius of station WTWS's location in New London.

intended to eliminate or obfuscate the indemnification requirement imposed on must-carry stations that are also considered "distant" signals for copyright purposes.

9. R&R Media Corporation's Complaint does not establish that station WTWS is entitled to carriage on all portions of Tele-Media's cable system. Before granting WTWS carriage on its cable system, Tele-Media Company of Western Connecticut may require indemnification from R&R for Tele-Media's increased copyright liability due to its carriage of WTWS on the portions of Tele-Media's system outside of WTWS's specified zone where the station would be considered a "distant" signal.

10. Accordingly, IT IS ORDERED, that the complaint (CSR-4128-M) filed September 13, 1993, by R&R Media Corporation IS DENIED in accordance with § 614(d)(3) (47 U.S.C. § 534) of the Communications Act of 1934, as amended. This action is taken by the Deputy Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules, 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTURY SOUTHWEST CABLE
TELEVISION CORP.

Petition for Stay of Local
Rate Order of City of
West Hollywood, CA

ORDER

Adopted: May 13, 1994; Released: May 13, 1994

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. In this *Order*, we grant in part the stay requested by Century Southwest Cable Television Corporation[1] ("Century") with regard to the local rate order adopted by the City of West Hollywood, California for Century's basic service tier rates and associated equipment and installations. This stay will be in effect until West Hollywood prescribes rates for Century's customer-related installations. This stay is granted only with respect to that portion of West Hollywood's rate order setting Century's installation rates at zero. This stay is denied with respect to the portion of West Hollywood's rate order establishing charges and refund obligations for Century's basic service rates and associated equipment.[2]

2. On March 7, 1994, West Hollywood adopted an order requiring Century to establish within forty-five (45) days a new rate schedule for its basic service tier and associated equipment and installation and to issue refunds, dating back to September 1, 1993, to subscribers for charges in excess of the newly established rates. Century asserts that if a stay of the local rate order is not granted, it will be required to implement refunds to subscribers totaling $160,000 and will be forced to forego monthly revenues on a prospective basis of $53,000. In its Emergency Petition for Stay of Enforcement Pending Review filed on April 8, 1994, Century seeks a stay of the local rate order pending the Commission's resolution of Century's appeal on the merits, also filed April 8, 1994.[3] As discussed below, and based on the entire record before us, we conclude that West Hollywood appears to have misapplied our rules by setting Century's rates for certain customer-related installations at zero. The City's actions in this regard, however, seem to have resulted, at least in part, from Century's own failure, over a prolonged period of time, to provide West Hollywood with the information that it requested to complete its review of Century's FCC Form 393.[4] Therefore, as part of this stay order, we will require Century to submit to West Hollywood, within ten (10) days of the release of this *Order*, the information required under Part III, Schedule D of Form 393.

II. BACKGROUND

3. *Legal Standard for Evaluating Petitions for Stay.* The Commission evaluates petitions for stay under well-settled principles. To support a stay, petitioners must demonstrate: (1) that they are likely to prevail on the merits; (2) that they will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay.[5] As described below, resolution of this particular stay rests mainly on the strength of petitioner's argument concerning the first prong of this test.

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[1] On April 19, 1994 the Commission granted a temporary stay effective until May 13, 1994 to ensure that the Commission was able to consider any opposition filings to Century's petition for stay. *See Order* (Emergency Petition for Stay of Local Rate Order by Century Southwest Cable Television Corp. against the City of West Hollywood), DA 94-382 (released April 21, 1994).

[2] Century has requested that the stay apply to West Hollywood's entire rate order, including rates established for basic tier service and associated equipment and installations. Although Century centers its petition for stay on West Hollywood's setting of its installation rates at zero, Century also challenges (1) the City's allocation of 100% of Century's labor cost in calculating Century's hourly service charge (HSC), (2) the City's refusal to count certain channels in calculating Century's permitted basic rate, and (3) the City's refusal to provide Century with a copy of the Form 393 on which the City based its findings. However, West Hollywood argues in its opposition that Century's claims involving its basic tier rates and associated equipment involve matters of a routine dispute and that granting a full stay would eviscerate the purpose of the Cable Act by allowing cable operators to unduly delay the implementation of reasonable rates. We agree with West Hollywood. Therefore, the issues that Century raises with regard to the establishment of Century's basic service tier rates and associated equipment, as mentioned above, will be addressed in the Commission's review of Century's appeal, but do not merit the granting of a stay.

[3] Along with its petition for stay, Century also filed on April 8, 1994, a Petition for Review of Rate Order. In response, the City of West Hollywood filed a Respondent's Opposition to Emergency Petition for a Stay of Enforcement Pending Review on April 26, 1994 and a Respondent's Opposition to Century's Petition for Review of Rate Order on May 2, 1994. Under Section 76.944(b) of the Commission's rules (47 C.F.R. § 76.944(b)) oppositions to an appeal must be filed within fifteen (15) days after the appeal is filed and under Section 1.45(d) of the Commission's rules (47 C.F.R. § 1.45(d)) oppositions to a stay must be filed within seven (7) days after the request for stay is filed. However, neither of West Hollywood's filings will be deemed late because West Hollywood has filed its pleadings during the period of the temporary stay, which was granted in order for the Commission to issue its decision with the benefit of a complete record. Moreover, West Hollywood argues quite persuasively that the lateness of its filings is a result of the defective service of Century's petition for stay and petition for review.

[4] West Hollywood has requested that Century provide it with information for Part III, Schedule D of Form 393. This section determines the flat rates that a cable operator may charge for specific types of installations. Cable operators are given the choice between providing installations based on an hourly service charge or based on a flat rate that is derived by multiplying the hourly service charge by the average period of time it takes to complete the specific type of installation.

[5] *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C.

4. The main contention raised in Century's petition for stay centers on West Hollywood's setting of Century rates for certain installations at zero. Century claims that this action was arbitrary and capricious and clearly in violation of the Commission's rate regulations. West Hollywood counters that it set Century's installation rates at zero only as a temporary measure to encourage Century to provide it with information necessary to determine if Century's rates are reasonable.

5. Under the Cable Television Consumer Protection and Competition Act and the Commission's rules,[6] cable operators are required to set their rates for regulated customer equipment and installations using a cost-based method. In effect, the cable operator must supply customer equipment, such as converters and remotes, and make installations at rates based on its own costs including a reasonable rate of return. In this case, Century contends that West Hollywood's setting of Century's installation rates at zero clearly violates the Commission's rate regulations because it has no basis under the Commission's rules. Moreover, Century argues that it is under no obligation to provide West Hollywood with the information required under Part III, Schedule D of Form 393. Century claims that it has decided to offer installations based on a rate determined by the hourly service charge (HSC), rather than compute a flat rate for each type of installation. Because it has made this choice and because this election is left to the cable operator's discretion, Century contends that it does not need to provide West Hollywood with the information required under Part III, Schedule D, which is only applicable to operators that choose to offer flat rates for installations.

6. West Hollywood, on the other hand, argues that Century's conduct during the City's period of review of Century's proposed rates left West Hollywood with few options regarding Century's installation rates. After initially reviewing Century's Form 393 submitted to the City on November 18, 1993 and extending its evaluation period by an additional ninety (90) days on December 6, 1993, West Hollywood informed Century of numerous deficiencies in its Form 393 on December 28, 1993. On January 31, 1994, Century responded by submitting a revised Form 393 and a letter of explanation. According to West Hollywood, Century's submission did little to aid West Hollywood in analyzing Century's Form 393. Finally, West Hollywood asserts that Century did not even have a representative attend the City's rate hearing on March 7, 1994 after receiving ample notice of that hearing. Essentially, West Hollywood contends that Century has had many opportunities to explain its position to West Hollywood, but has instead stonewalled. West Hollywood claims that it did not intend to establish a permanent rate of zero for Century's installations. Instead, it temporarily set Century's rates for installations at zero to encourage Century to provide West Hollywood with the data that it had requested. The order indicates that the rates established therein for installation are not intended to be Century's just and reasonable rates, and that the City intends to issue a final rate order after receiving all requested information from Century.

7. West Hollywood also contends that Century has been charging flat rates for installations, not an hourly service charge, as evidenced by the charges listed on its rate card. Furthermore, West Hollywood claims that Century never informed West Hollywood of its decision to switch from a flat rate to an hourly service charge. Even if Century does switch to an hourly service charge from a flat rate system, West Hollywood asserts that Century still must justify the rates it has been charging to subscribers for installations since September 1, 1993 in order for West Hollywood to compute Century's refund liability. Without the data required in Part III, Schedule D of Form 393, West Hollywood is unable to determine whether Century's installation rates have been reasonable.

III. DISCUSSION

8. Generally, the Commission prefers to leave regulation of basic tier service to the sound discretion of the certified local franchising authorities. West Hollywood has conceded that it temporarily set Century's installation rates at zero to encourage Century's full compliance with the City's repeated requests for more information. Furthermore, West Hollywood emphasizes that this action was not an attempt to set permanent reasonable rates for Century's customer-related installations. Although local franchising authorities have broad authority to encourage compliance with their requests for information,[7] including setting rates, they must exercise that authority in accordance with the Commission's rules. Setting Century's installations rates at zero was not in accordance with our rules and was not within the scope of West Hollywood's regulatory authority.[8]

9. We recognize that Century's own conduct contributed to West Hollywood's ultimate decision to set Century's installation rates at zero. We emphasize that the Commis-

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Cir. 1985) (per curiam); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

[6] Under the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment and installations. *See* Cable Television Consumer Protection and Competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), 47 U.S.C. § 543(b).

[7] In fact, under rules recently adopted by the Commission, local franchising authorities ". . . have the authority to deem a non-responsive operator in default and enter an order finding the operator's rates unreasonable and mandating appropriate relief. This relief could include, for example, ordering a prospective rate reduction and a refund. Such a refund would be based on the best information available." *Third Order on Reconsideration* in MM Docket 92-266, FCC 94-40 at para. 84 (released March 30, 1994). In light of this authority now vested in local franchising authorities, we clarify a statement made in a previous order suggesting that local franchising authorities encountering resistance from a cable operator should seek assistance from the Commission. *See Order* (Petition for Stay of Local Rate Order by TCI Cablevision against the City of St. Louis), DA 94-424 at note 4 (released April 29, 1994). Because local franchising authorities have now been granted remedial powers similar to those at the Commission level, it will be unnecessary for local franchising authorities to seek assistance from the Commission.

[8] If West Hollywood had provided a reasonable basis for imposing customer-related installation rates on Century, the entire rate order, rather than portions of the rate order, would have simply been a matter for appeal and no stay would have been granted.

sion expects cable operators to do their best to facilitate the efficient and effective review of proposed rates by local franchising authorities. This effort should include full cooperation with reasonable requests by local authorities for data in support of asserted costs and rates. Our rate regulations are clear in placing the burden on operators to justify their regulated rates for basic tier service and associated equipment and installations. Therefore, uncooperative and recalcitrant conduct will not be tolerated by the Commission and need not be tolerated by local franchising authorities.

10. As a condition to the grant of this stay, Century shall, as Century volunteered to do in its petition, deposit in an interest-bearing escrow account the total amount of money that West Hollywood has ordered Century to refund to its customers and to deposit on a going-forward basis in that account the difference between the rates Century actually charges its customers and the rates that West Hollywood has set for Century's installations in its local rate order. Furthermore, Century shall inform its subscribers, at its own expense, that it is setting up this escrow account and that subscribers who are moving away from West Hollywood should leave a forwarding address with Century so that they can receive any potential refunds due should the City's rate order be implemented.

11. Accordingly, IT IS ORDERED that the Emergency Petition for Stay filed by Century Southwest Cable Television Corporation is GRANTED IN PART and DENIED IN PART. Specifically, Emergency Petition for Stay is GRANTED IN PART and the portion of the local rate order adopted by the City of West Hollywood setting Century Southwest Cable Television Corporation's customer-related installation rates is STAYED until the City has prescribed reasonable rates. The Emergency Petition for Stay is OTHERWISE DENIED.

12. IT IS FURTHER ORDERED that Century Southwest Cable Television Corporation must submit to the City of West Hollywood a completed Part III, Schedule D of Form 393 within ten (10) days of the release of this order.

13. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M.H. Wallman
Deputy Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Bell Atlantic Transmittal No. 645
Telephone Companies
Revisions to
Tariff F.C.C. No. 1

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1994; Released: May 13, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On April 1, 1994, the Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 645 to restructure the network cable rack rate element associated with its special access collocation tariff. Bell Atlantic states that it would restructure this rate from a per service, per foot charge to a per service only basis in response to customers' comments that a per foot charge is administratively burdensome. Description and Justification at 1. Bell Atlantic proposes to restructure this service from one that offers a dedicated path between a collocator's cage and Bell Atlantic's frame to one in which a cable path is shared by both collocators and Bell Atlantic. According to Bell Atlantic, customers have indicated that they would accept a shared path in return for a lower rate. *Id.* at 1-2. Transmittal 645 is scheduled to take effect on May 16, 1994.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*. Therefore, Transmittal No. 645 is suspended for one day, until May 17, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*.[1] This transmittal will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 645, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Bell Atlantic SHALL FILE tariff revisions within five business days of the effective date of this order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Bell Atlantic should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Bell Atlantic shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 17, 1994

SOUTHWESTERN BELL PETITIONS FOR EXPEDITED WAIVER OF SECTION 69.4(b)

COMMENTS: May 30, 1994
REPLY COMMENTS: June 9, 1994

On May 13, 1994, the Southwestern Bell Telephone Company (Southwestern) filed a petition for waiver of Section 69.4(b) of the Commission Rules, 47 C.F.R. § 69.4(b). Southwestern seeks a waiver to establish rate elements for a new operator service provided to Interexchange Carriers (IXCs) -- Designated Operator Services (DOS). Southwestern requests expedited treatment so that it will have a product available to meet the needs of customers renegotiating their contracts in the fall of 1994.

Southwestern states that DOS would provide basic operator services to IXCs for any call requiring automated or operator-assisted call completion. These services would include: (1) alternate billing services (calling card, collect, third-number billing), (2) call processing, (3) dialing instructions and other operator assistance, (4) carrier rate information and (5) customized call branding. Southwestern notes that these basic operator services for IXCs are comparable to those described recently in a Part 69 waiver request filed by the Bell Atlantic Telephone Companies.

Interested parties may file comments on Southwestern's petition for waiver no later than **May 30, 1994**. Replies should be filed by **June 9, 1994**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-34

In the Matter of

Implementation of
Commission's Equal
Employment Opportunity Rules

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: May 16, 1994; Released: May 16, 1994

By the Chief, Mass Media Bureau:

1. On April 20, 1994, the Commission adopted a *Notice of Inquiry*, FCC 94-103, released April 21, 1994, to obtain comment on the effectiveness of the Commission's rules, procedures, policies, standards and guidelines in promoting equality of employment opportunity. Comment and Reply Comment dates were established for May 23, 1994, and June 7, 1994, respectively.

2. On May 12, 1994, the Office of Communications of the United Church of Christ, the Institute for Public Representation, and the Minority Media and Employment Council (hereinafter "Petitioners") filed a Request For Extension of Time to Submit Comments. Petitioners requested that we extend the dates for submission of comments 21 days, through and including June 13, 1994, and give a comparable extension of time for the submission of reply comments. In support of their request petitioners stated that the 30 day time period is an insufficient amount of time to prepare a comprehensive response to issues raised in the *Notice*. They state that they are limited in staff size and lack the resources to respond to the *Notice* in such a short time. They also argue that an extension of time would aid the Commission's decisional processes by enabling a greater number of parties to participate and by allowing them the opportunity to further the quality of their submissions.

3. As set forth in Section 1.46 of the Commission's Rules, 47 C.F.R. Section 1.46, it is our policy that extensions of time not be routinely granted. However, we believe that the petitioners in this case may be in a particularly good position to assist the Commission given their longstanding involvement in these issues. Accordingly, we will grant the requested relief. However, given the October 5th deadline for the Commission to submit its report to Congress, we do not intend to grant further extensions of time.

4. Accordingly, IT IS ORDERED that the Request For Extension of Time filed by Petitioners IS GRANTED.

5. IT IS THEREFORE ORDERED that the dates for filing comments and reply comments in this proceeding ARE EXTENDED to **June 13, 1994**, and **June 28, 1994**, respectively.

6. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 4(i) and 303(r) and Sections 0.204(b), 0.283 and 1.46 of the Commissions Rules, 47 C.F.R. Sections 0.204(b), 0.283 and 1.46.

7. For further information concerning this proceeding, contact Hope Cooper, Enforcement Division, Mass Media Bureau, (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Transmittal No. 1672
Tariff F.C.C. No. 128

Special Access Optional Pricing Plan

ORDER

Adopted: May 19, 1994; Released: May 19, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On December 21, 1993, Pacific Bell (Pacific) filed the above-captioned tariff revisions to introduce a special access optional calling plan for high capacity DS1 services.[1] The plan, as originally filed, offered access customers discounted DS1 rates for both recurring and nonrecurring charges in return for term and volume commitments. The availability of the discount was limited to a single rate zone.[2] Transmittal No. 1672 is scheduled to take effect on May 20, 1994.

2. On January 6, 1994, MFS Communications Company, Inc. (MFS) filed a petition to reject, or to suspend and investigate, Transmittal No. 1672. Pacific filed a reply on January 13, 1994. In its petition, MFS alleges that by limiting the discount to services offered out of a single zone, Pacific is attempting to obtain a form of geographically deaveraged pricing flexibility that was not approved by the Commission in the *Expanded Interconnection Order*. MFS also contends that the single zone-specific offering is unreasonably discriminatory because the volume and term discounts are available only to customers served out of Zone One. Finally, Pacific's proposed termination liability provisions are discriminatory, according to MFS, because the discount structure proposed by Pacific would impose different termination liability on identically situated customers.

3. The Common Carrier Bureau has reviewed Pacific Bell Transmittal No. 1672, all associated pleadings and Pacific's modifications. We conclude that no compelling argument has been presented that the tariff transmittal, as revised, is so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

4. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1672 filed by MFS IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] The Commission allows local exchange carriers (LECs) to establish a system of traffic density-related zones to permit special access rates to be priced more competitively. In response, most LECs have established three zones in their respective service areas. *See*, Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*).

[2] On May 18, 1994, we granted Pacific special permission to expand its plan to all three zones and to make other modifications to the discount plan. *See*, Letter from Chief, Tariff Division to J.A. Goddard, Pacific Bell (May 19, 1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

IC Docket No. 94-31

In the Matter of

Preparation for International
Telecommunication Union World
Radiocommunication Conferences

NOTICE OF INQUIRY

Adopted: April 20, 1994; Released: May 5, 1994

Comment Date: June 6, 1994
Reply Date: June 27, 1994

By the Commission:

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I. INTRODUCTION

1. By this *Notice of Inquiry* (*NOI*), we begin a proceeding to prepare for the 1995 and future World Radiocommunication Conferences (WRCs). The next WRC, WRC-95 is scheduled to convene in November 1995, and is expected to consider a substantive agenda recommended to it by the 1993 World Radiocommunication Conference (WRC-93). In accordance with the International Telecommunication Union's (ITU) current plan that schedules WRCs biennially, WRC-95 also will recommend an agenda for WRC-97 and will develop a preliminary agenda for WRC-99. In this proceeding, we seek information to assist us in developing U.S. proposals relating to issues on the agenda of WRC-95, and in refining recommended and preliminary agendas for WRC-97 and WRC-99. Well-developed U.S. proposals at future world conferences should promote competitiveness in world telecommunication markets. In addition, facilitating the introduction of new services such as worldwide mobile-satellite services will foster universal access to telecommunication services and could be a key component of a seamless, global communications network. In this proceeding we also solicit comment on how the FCC might improve its future conference preparatory process to ensure responsiveness to the needs of U.S. industry and the public.

II. BACKGROUND

2. *World Radiocommunication Conference Scheduling Cycle.* The 1992 ITU Additional Plenipotentiary Conference (APP) adopted a major restructuring of the ITU.[1] Part of that restructuring was a recommendation that WRCs normally convene every two years, and that a four year conference planning cycle be initiated. Thus, each WRC would consider current substantive issues, develop a recommended agenda for the next WRC in two years, and recommend a preliminary agenda for the following WRC in four years. The first of these regularly scheduled conferences was WRC-93. In accordance with APP Resolution No. 9,[2] WRC-93 convened in Geneva in November of 1993 to recommend to the ITU's Administrative Council (Council) a substantive agenda for WRC-95, and to begin the aforementioned four-year WRC planning cycle by recommending a preliminary agenda for WRC-97.

3. *WRC-93 Results.* The Council, based upon the APP's recommendations, directed WRC-93 to recommend including on the agenda of WRC-95 two specific topics: 1) a review of the Radio Regulations based upon a report of the Voluntary Group of Experts (VGE), and 2) facilitating use of frequency bands allocated to the mobile-satellite service (MSS).[3] WRC-93 did indeed recommend that these two items be included on the agenda of WRC-95. In addition, WRC-93 recommended that WRC-95 review the progress of studies related to the following topics: 1) Resolution No. 712 (WARC-92), dealing with space service allocation issues not considered at the 1992 World Administrative Radio Conference (WARC-92); 2) revision of Appendices 30

[1] *See Final Acts of the Additional Plenipotentiary Conference*, Geneva, 1992. Specifically, for restructuring of the ITU, *see* Articles 7-14 of the *Constitution* (CS). *See also Notice of Inquiry*, ET Docket No. 93-198, 8 FCC Rcd 4512 (1993) at paras. 2 and 3.

[2] *See Final Acts of the Additional Plenipotentiary Conference*, Resolution No. 9 (Geneva 1992).

[3] *See* Resolution No. 1032, Document 7346-E, 47th ITU Administrative Council (Geneva, 1992).

and 30A for Regions 1 and 3; and 3) availability of high-frequency broadcasting (HFBC). Each of these issues are discussed in more detail below.

4. WRC-93 also agreed on a preliminary agenda for WRC-97 that includes the following topics: 1) unresolved issues from WRC-95, including specifically those related to the mobile-satellite service; 2) revision of Appendices 30 and 30A; 3) HFBC matters; 4) various maritime and aeronautical issues; 5) several unresolved Resolutions and Recommendations from past conferences; and 6) preliminary views on agendas for the 1999 and 2001 WRCs.[4]

III. DISCUSSION

5. We seek information and comments that address technical and regulatory matters related to the agenda items included in the WRC-93 Final Acts. The information we receive will assist us in developing proposals and positions that will advance U.S. goals at WRC-95. Since WRC-95 also will recommend an agenda for WRC-97 and a preliminary agenda for WRC-99, parties also are invited to identify any new issues that would be timely for consideration at those conferences.

A. Agenda for the 1995 World Radiocommunication Conference

1. REVIEW OF THE FINAL REPORT OF THE VOLUNTARY GROUP OF EXPERTS (VGE)

6. The recommended agenda for WRC-95 includes a review of the report of the Voluntary Group of Experts (VGE) and necessary related actions.[5] The VGE was formed by the ITU Administrative Council in 1990, in response to Resolution No. 8 of the ITU Plenipotentiary Conference (Nice, 1989).[6] Its objective was to develop recommendations for simplifying the Table of Frequency Allocations and the other provisions of the Radio Regulations. The group's work was divided into three task categories, each addressing a major part of the Radio Regulations: Task 1 - Allocation matters; Task 2 - Procedural Matters Related to the Use of Frequencies; and Task 3 - Operational and Administrative Matters. The VGE held its last meeting over the period 23 February - 4 March 1994. Its report will be provided to the ITU Council and forwarded to administrations for consideration at the WRC-95.[7]

7. In general, the VGE sought to simplify text without affecting significantly the substance of the regulations. Its recommendations include specific revisions to portions of the Radio Regulations for consideration by WRC-95 as well as general guidelines that may be relevant for consideration by WRC-95 and other future WRCs. Parties interested in the topics addressed by the VGE are encouraged to refer to the VGE output texts. For convenience, some of the key issues of the VGE are summarized below.

8. *VGE Task 1: Allocation Matters.* The VGE considered several approaches to simplifying the Table of Frequency Allocations and related provisions of the Radio Regulations. The VGE decided to recommend retention of the basic structure of allocations whereby the radio frequency spectrum is divided into sections called bands each being "allocated" to one or more radio services; moreover, the concepts of "primary" and "secondary" services and the concepts of "allotment" and "assignment" were recommended to be retained. The definitions of the radio services were reviewed to see if a smaller set of more broadly defined services would be practicable; however, the VGE decided against recommending restructuring the service definitions.[8] The VGE did develop under Task 1 recommendations of both a general and specific nature.

9. The recommendations of a general nature were presented as potential guidelines that might be taken into account at future WRCs dealing with allocation matters, for example:

> a) Where possible, the most broadly defined services should be allocated (e.g., favor use of "mobile-satellite" rather than "maritime mobile-satellite"), to promote flexibility of use; also, allocations should be made applicable over the broadest geographical area possible (i.e., maximize alignment of allocations among different regions).
>
> b) Footnotes to the Table of Frequency Allocations should be limited to cases that alter, limit or otherwise change the relevant allocations (rather than outlining procedural matters); footnotes should be used sparingly and only where international implications necessitate their use; footnotes should be used only to achieve flexibility, to protect existing usage, to promote compatibility for transitional situations, or to provide for the specific requirements of a country or area; footnotes serving a common purpose should be written in a common format.
>
> c) Encourage periodic review by administrations and the Radiocommunications Bureau to identify those country-specific footnotes to the Allocations Table that are no longer needed and may be deleted; moreover, it should be possible at future WRCs for countries to remove themselves from footnotes irrespective of the WRC agenda otherwise defined.

10. The VGE also prepared some specific recommendations on the frequency allocations, including: a) standardization of texts for certain types of footnotes (e.g., those related to the Radio Astronomy service, and those related to use of frequencies for Industrial Scientific and Medical purposes), b) standardization of text for those footnotes referring to the former Article 14 procedure, and c) dele-

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[4] *See Final Acts of the World Radiocommunication Conference* (Geneva, 1993), attached as Attachment 1.

[5] Agenda item no. 1 reads: "to review the final report of the VGE, and to consider related proposals from administrations, in order to undertake, as appropriate, a revision of the Radio Regulations and to provide a timetable for the implementation of outstanding recommended actions."

[6] See Final Acts of the ITU Plenipotentiary Conference, Nice, 1989, Resolution No. 8.

[7] A major portion of Report of the VGE (including Part A: General Guidelines and Recommendations, and Part B: Recommended Changes to the Radio Regulations) has been entered in the docket file of this proceeding and will be available for review.

[8] As an exception, the VGE did recommend deletion of the unique definition for "aeronautical fixed service" and it presented an associated recommendation to revise the one affected allocation block.

tion of the "Permitted" category of service and consequential revision of allocations and associated footnotes maintaining the intent of the existing regulations.

11. Parties are invited to comment on the approaches indicated above and on specific proposals outlined in the report of the VGE including consideration as to what extent such allocation matters should be treated by WRC-95.

12. *VGE Task 2: Procedural Matters Related to the Use of Frequencies.* The VGE has undertaken a major re-write of the regulatory procedures (e.g., Articles 11-17). The topics contained within these articles relate to:

- Rights and obligations relating to frequency assignments,
- Examinations undertaken by the Bureau,
- Assistance from the Bureau for administrations,
- Status of entries in the Master International Frequency Register,
- Advance publication (of space systems),
- Coordination procedures,
- World or regional frequency allotment or assignment plans,
- The procedure relating to HF broadcasting,
- Actions by the Bureau, and procedures for review of findings.

13. The VGE employed a "clean slate" approach for simplification of the regulatory procedures; it decided to recommend a basic regulatory procedure (for the coordination and notification of radio frequency assignments) to embrace all the common elements that may apply to various services and bands. The basic procedure includes, to the extent practicable, the provisions necessary to deal with the unique circumstances encountered for particular bands and/or services. This approach was pursued because of concerns over a growing number of slightly distinct procedures that needed to be followed for different bands and categories of frequency assignments.

14. The VGE adopted the principle that all important features of the existing procedures should be preserved and, as far as possible, the wording of existing texts should also be preserved. However, because of the complexity of some of the current procedures -- and because some judgment had to be used by the VGE in its effort to develop a simplified set of regulations -- it is possible that elements of the procedures important to some categories of licensees could have been overlooked.[9] Moreover, in the development of the new regulatory text, some matters of detail have been purposely left out of the body of the text with the intention that such details will be covered by the "Rules of Procedure" to be developed by the Radiocommunication Bureau for adoption by the Radio Regulations Board[10]

15. Many of these regulatory procedures have been the subject of lengthy and delicate negotiations at previous radio conferences. Thus, the VGE's work will be reviewed closely to consider the extent to which it reflects the intent of long-held understandings within the ITU radiocommunication sector. Parties should comment on whether a) the VGE proposed improvements reflect changes that are helpful or detrimental to national interests

[9] For example, the VGE-proposed text would appear to supersede Resolution 46 -- the procedure for coordination of *non-geostationary* satellite networks, recently adopted by WARC-92 for application in selected mobile-satellite frequency bands. Resolution 46 contains a unique process for identification of administrations with which coordination must be accomplished. That process begins with the initiating administration submitting its request for coordination to the ITU for publication in the ITU's Weekly Circular (Special Sections for Space Systems). Then, upon reviewing the Weekly Circular, administrations not agreeing with the proposed space segment use would be required to respond to the initiating administration by a date certain providing the technical basis for opposition. Thus, only those administrations that tracked the Weekly Circular, anticipated technical difficulties and responded within the treaty-stipulated time-frame would be considered in coordinations. In recognition of the potentially large number of administrations involved, WARC-92 considered it necessary to establish a clearly defined process with distinct, yet reasonable, time limits. The VGE's basic procedure for coordination (covered in Article S9 of the VGE recommendations) includes provisions that would likely replace Resolution 46. A question arises as to whether the VGE's Article S9 retains the essential attributes of the current process. In an effort to simplify, the VGE has applied a standard process for nearly all cases of coordination; i.e., a request for coordination must be mailed to all potentially affected administrations (Article S9, ¶ 3.12). This could be a daunting undertaking -- particularly for *non-geostationary* satellite systems -- so the VGE has included the alternative of requesting that the posting in the Weekly Circular constitute a request for coordination (¶ 3.12 *bis*). However, a definitive cut-off of other administrations' rights in the event of silence appears to have been lost. Noting that responding administrations may take their own *planned* assignments into account when assessing the proposed non-geostationary space service, this could be an impossible undertaking. Parties may wish to consider whether the VGE reformulation of the existing, mandatory, Resolution 46 procedure is workable. If it is not, parties should indicate specific concerns and possible improvements that could be recommended by the U.S.

[10] The Rules of Procedure (ROP) outline specific actions to be taken by the Radio Regulations Board (RRB) and the Radiocommunication Bureau (RB) in implementing the Radio Regulations (RRs) -- particularly with respect to the notification and recording of radio frequencies in the Master International Frequency Register. The VGE proposes having fewer of the details in the treaty text of the RRs, allowing for development of more comprehensive ROP. The VGE has included in its report a comparative table listing the current regulatory provisions and their recommended disposition, including those provisions which are recommended for transfer to the ROP. The responsibilities of the RB to develop the ROP and the RRB to approve them are established in the ITU Constitution and Convention, (see CS95 and CV168, Final Acts of the Additional Plenipotentiary Conference, Geneva, 1992); the VGE has also recommended provisions in the RRs elaborating on the process of review/approval of the ROP. These rules are important because they ultimately affect administrations' rights and obligations with respect to their frequency assignment. The provisions removed from the RRs would cease to be subject to the rigorous negotiations associated with WRCs and the increased flexibility afforded the RB might facilitate expeditious development of procedures as necessary. Parties may wish to address the desirability of effecting the proposed transfer of selected RR provisions to the ROP as well as the process for their development, review, and approval as elaborated in the VGE report.

and b) it is timely and feasible to address such matters in the context of on-going frequency assignment, coordination and notification activity. Also, where difficulties are foreseen with the VGE recommendations, parties should indicate alternative approaches and solutions, where appropriate.

16. *Task 3: Operational and Administrative Matters.* The work within this task embraces all of the provisions of the Radio Regulations (RRs) not covered by tasks 1 and 2; this consists of approximately 65 Articles in the RRs and numerous appendices. As with the other VGE tasks, the group has sought to identify redundant, superfluous and outdated text.

17. Considerable attention was given to identifying text that might be moved from the RRs to other supporting documentation, such as the Recommendations of the Radiocommunication Sector (formerly known as CCIR Recommendations). The regulatory force of such material could be maintained, if desired, by specific references within the RRs to the applicable recommendation. This technique has been referred to as "incorporation by reference." This is seen as a possible means to trim some bulky technical material from the RRs while facilitating its updating on a regular basis by the relevant study group. WRCs could continue to oversee the formal incorporation of the updated recommendation into the RRs by routinely including such matters on the WRC agendas. During the VGE discussions, some participants observed that there was value in having ITU documentation self contained. Because the RRs cover a number of diverse radio services, one must consider the trade-offs between the breadth of coverage and the reference value for particular radio services. Parties addressing this issue should consider the legal/treaty considerations apart from the publication formats, also bearing in mind the role of ancillary publications.[11]

18. In an effort to eliminate redundant text and improve readability, text presenting information on usage of special frequencies has been reformatted and augmented by tables similar in structure to the present Appendix 18. This approach has been utilized for Article N38, where similar text in the current version is repeated for each distress/safety frequency. A significant reduction in length and improvement in clarity is obtained. Respondents are invited to comment on these recommendations as appropriate.

2. MOBILE SATELLITE SERVICES

19. In our preparations for WRC-93,[12] we noted that U.S. entities have shown a strong desire to provide mobile-satellite service (MSS) from both geostationary (GSO) and low-earth orbit (LEO) platforms. MSS holds great promise for providing a seamless, worldwide communication infrastructure. Facilitating the introduction worldwide of commercial MSS could create a brand new U.S. industry, and consequently, new employment opportunities in the United States. Because of the promise this new enterprise holds for U.S. industry, a major goal of the U.S. delegation at WRC-93 was to facilitate the introduction of worldwide MSS. The recommended WRC-95 agenda allows the United States the opportunity to address all issues related to its MSS requirements by: 1) providing for a review of technical constraints associated with frequency bands below 3 GHz that are allocated to MSS; 2) a review of the date of entry into force of certain MSS allocations in the 2 GHz range; 3) consideration of allocations and regulatory aspects of feeder links for MSS; and, 4) with a view toward WRC-97 taking substantive action, consideration of requirements for MSS and associated feeder links, including adopting limited allocations in 1995.[13] In addition, the preliminary agenda for WRC-97 allows for consideration of unresolved MSS issues from WRC-95.[14] Specific WRC-95 MSS agenda items are discussed below.

20. *Review of Technical Constraints.* WRC-93 has included on the recommended agenda for WRC-95 a review of technical constraints associated with bands below 3 GHz that are allocated to MSS, with a view to removing or amending the constraints in order to facilitate the introduction of MSS operations.[15] This agenda item is broad and could include a wide range of issues. We invite parties to identify and address technical constraints that might hinder the advancement of worldwide MSS operation. For example, are there any technical limits, either in the allocation table or in specific rules of the Radio Regulations that could be removed or improved to help facilitate the implementation of worldwide MSS in bands below 3 GHz?[16] If so, what actions can the United States take to remove unnecessary constraints? Additionally, are there any technical studies or requirements that should be developed that would ease the introduction of worldwide MSS, particularly in bands to be shared with other services?[17]

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[11] Numerous ancillary publications on detailed operational matters are prepared by the Radiocommunication Bureau to augment the Radio Regulations. The scope of some of these are defined in the Radio Regulations (most notably in Article 26). The VGE has recommended the suppression of a substantial portion of Article 26, dealing with "Service Documents." The proposed revision would maintain the obligation to prepare most (but not all) of the publications listed therein. However, the VGE recommends that the details of their content be "decided by the Bureau in consultation with administrations."

[12] *See WRC-93 NOI, supra* at para. 7.

[13] *See WRC-93 Final Acts,* Resolution No. COM 4/1 a 2.1 a), 2.1 b), 2.1 c) and 3 d).

[14] *See Final Acts, supra,* at Resolution No. [COM 4/2], agenda item 3.1.

[15] *See Final Acts, supra,* at 2.1 a).

[16] For example, some administrations have expressed concern that non-voice, non-geostationary MSS operations below 1 GHz (NVNG MSS) might cause interference to existing terrestrial services. In the United States two footnotes, US 323 and US 325 (*see Report and Order,* ET Docket No. 91-280, 8 FCC Rcd 1812 (1993)), were added to the table of allocations. These footnotes establish coordination thresholds and impose limits on the duration and/or power levels of MSS transmissions in the 148-149.9 MHZ band. They were added specifically to protect fixed and mobile services. Similar footnotes, adopted internationally, might ease interference concerns of some administrations and thereby facilitate implementing NVNG MSS worldwide.

[17] For example, many administrations are concerned about the effect new MSS services might have on existing terrestrial services. Parties should address that concern, bearing in mind any related work being carried out in ITU-R Study Groups. Another area of concern might be the effect of MSS operations on safety services. For example, in the United States we have adopted priority and preemption requirements to assure that safety and distress communications are given precedence in the 1.5/1.6 MHz MSS bands. Although standards to ensure priority and preemption are under development in different fora, perhaps adopting certain worldwide *provisions* would facilitate in-

21. *Date of Entry into Force of 2 GHz Allocations.* Agenda item 2.1(b) concerns a review of the date of entry into force of MSS allocations in the 1980-2010 MHz and 2170-2200 MHz bands in Regions 1 and 3, and of MSS allocations in the 1970-2010 MHz and 2160-2200 MHz bands in Region 2.[18] At WARC-92, there was disagreement among administrations regarding the effective date of entry into force of MSS allocations in the 2 GHz frequency range noted above. By footnote 746C (WARC-92) to the international table of allocations, the United States stated its requirement to permit MSS to be brought into use in these bands after 1995. Other administrations (by footnote 746B) may not commence operations until 2005. Among the considerations at WARC-92 that resulted in differing dates were diverse views on: projected MSS requirements; existing fixed service use; and, projected needs for terrestrial mobile radio services. The difference in dates could affect the status of an administration's proposed satellite systems vis-a-vis those of other administrations. We request parties to address the effect on U.S. MSS interests that advancing the date of entry into force of the global 2 GHz MSS allocations would have on future U.S. systems.[19]

22. *Allocations and Regulatory Aspects of Feeder Links.* Agenda item 2.1 (c) addresses allocations and regulatory aspects of MSS feeder links. Because of increasing demand for spectrum to launch new MSS operations, the adequacy of existing fixed-satellite service (FSS) spectrum to accommodate future MSS feeder link requirements,[20] and of the regulations that govern its use have come into question.

23. The Commission has noted previously that spectrum available for MSS feeder link use, particularly for non-geostationary (non-GSO) MSS systems operating above 1 GHz, will be scarce.[21] To ensure the viability of new non-GSO MSS systems, spectrum suitable for MSS feeder links must be identified. Current C and Ku-band FSS spectrum[22] appears too congested to support future non-GSO MSS feeder link requirements. Although the Commission is assessing the suitability of frequencies in the 20/30 GHz range and elsewhere for feeder link use,[23] sufficient spectrum has not yet been identified.[24]

24. With regard to regulatory aspects of feeder links, one issue is the status of non-Geostationary (non-GSO) MSS use of FSS spectrum for feeder links, vis-a-vis GSO FSS use of the same spectrum. RR No. 2613 stipulates certain obligations of non-GSO users of feeder link spectrum vis-a-vis FSS systems using the GSO.[25] The Commission's recently concluded "Above 1 GHz Negotiated Rule Making Committee" arrived at an interpretation of RR No. 2613 that would assure non-GSO operators greater equality with GSO FSS operators in the regulatory process that determines use of the subject spectrum.[26] This interpretation has been put forth in WP 4/A of ITU-R Study Group 4. Adequate spectrum for MSS feeder links and the ease of its use will be critical to future non-GSO MSS endeavors. Thus, to further development of non-GSO systems, action may be required to find additional spectrum for feeder links and/or to clarify RR No. 2613 in a manner that would be equitable to non-GSO operators.

25. We invite parties to comment on the feeder link issues discussed above. Specifically, with regard to non-GSO MSS, parties should address whether suitable technical arrangements can be devised for sharing of FSS spectrum between non-GSO MSS and GSO FSS feeder link operations. If so, what effect would these sharing arrangements have on the interpretation and application of RR No. 2613? Parties should also address whether frequency bands should be designated specifically for non-GSO feeder link use and whether additional feeder link spectrum will be required for all types of MSS.

26. *Future MSS Spectrum Requirements.* Agenda Item 3 (d) of the WRC-93 Final Acts provides for consideration of future requirements for MSS and associated feeder links with a view to taking substantive action at WRC-97. It also gives WRC-95 the latitude, if necessary, to adopt in 1995

troducing commercial MSS in the referenced bands. Parties are invited to address this point, recognizing the ongoing discussions within the International Civil Aviation Organization (ICAO) and the International Maritime Organization (IMO). Comments should identify specific areas to be explored, such as levels of priority, terminal identification protocols, spectrum access, and system availability, and whether Radio Regulations or Recommendations would be the be the appropriate mechanism.

[18] The ITU has divided the world into three Regions. Generally, Region 1 encompasses Africa, Europe and the Middle East; Region 2 encompasses the Americas and Greenland; and Region 3 encompasses India, Russia, Asia, Australia and New Zealand. *See* 47 CFR Section 2.104 (b) for a precise definition of the three Regions.

[19] Parties should note that WRC-93 recommended that WRC-95 consider the status of those MSS satellite networks in certain bands near 2 GHz which have been published with the ITU before WRC-95.

[20] Feeder links for MSS are in the fixed-satellite service and have use of FSS spectrum as specified in 47 CFR § 25.202.

[21] *See* "Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile-Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands," *Notice of Proposed Rulemaking* (MSS Above 1 GHz *NPRM)*, CC Docket No. 92-166, 9 FCC Rcd 1094 (1994), at paras. 70-77.

[22] I.e., the 3700-4200 MHz, 5925-6415 MHz, 11.7-12.2 GHz, 12.2-12.7 GHz and 14.0-14.5 GHz bands.

[23] *See e.g.*, MSS Above 1 GHz *NPRM*, *supra*, at para. 77.

[24] In addition, other sharing mechanisms, such as "reverse-band working", are being studied as a means of alleviating congestion in spectrum used for feeder links. Parties are invited to address alternatives for accommodating future feeder link requirements.

[25] RR No. 2613 states: "Non-geostationary space stations shall cease or reduce to a negligible level their emissions, and their associated earth stations shall not transmit to them, whenever there is insufficient angular separation between non-geostationary satellites and geostationary satellites resulting in unacceptable interference to geostationary satellite space systems in the fixed satellite service operating in accordance with these Regulations."

RR2613.1 states:

"1/ The level of accepted interference shall be fixed by agreement between administrations concerned, using the relevant CCIR Recommendations as a guide." Some parties believe that RR No. 2613 relegates feeder links for non-GSO MSS use to secondary status.

[26] *See Report of the MSS Above 1 GHz Rulemaking Committee*, CC Docket No. 92-166 (April 6, 1993).

limited MSS allocations. The current "patchwork" of international MSS allocations makes it difficult for any administration to implement MSS operations worldwide. It appears possible, for example, to implement MSS in some countries, but not in others.

27. We anticipate future requirements for additional MSS spectrum both below and above 1 GHz. Usable MSS spectrum will be difficult to identify and to allocate worldwide. We invite parties to explore all options for satisfying future MSS spectrum allocations.[27] As a starting point, interested parties should note that the 399.9-400.05 band has been allocated for NVNG MSS domestically. Although the United States sought at WRC-93 to have WRC-95 address frequency allocations and associated provisions relating to this band, the decision of WRC-93 was to place this topic on the WRC-97 agenda. We request comment on whether the United States should propose reallocation of this band under agenda item 3 (d) of the WRC-95 recommended agenda. Similarly, at WARC-92, the United States proposed unsuccessfully an international allocation of the 2390-2420 MHz band to GSO MSS. In its recent preliminary spectrum reallocation report,[28] NTIA has identified this spectrum as being available immediately for non-Government use.[29] Parties should address whether the United States should again pursue an international MSS allocation in this band. When addressing MSS allocations, parties should strive to portray accurately future demand for service, and to address technical issues associated with the use of proposed new MSS allocations. Those who comment should give their assessment of how much additional spectrum would be required to meet anticipated MSS demand, the basis for their assessment and where in the spectrum future MSS allocations might be located.

3. SPACE SERVICES

28. *Earth Stations in the 2025-2110 MHz band.* WARC-92 added primary allocations to the International table of allocations for the space research (Earth-to-space) (space-to-Earth), space operation (Earth-to-space) (space-to-Earth), and Earth exploration-satellite (Earth-to-space) (space-to-Earth) services to the existing primary allocations for the fixed and mobile services for the 2025-2110 MHz and 2200-2290 MHz bands. WRC-95 is to consider power limits for Earth stations in the space science services that operate in the 2025-2110 MHz band.[30] Several working parties have been actively considering requirements for various services to share these bands. Recommendation ITU-R SA.609 recommends that the aggregate value of interfering signals at the input to the spacecraft's receiver not exceed -181 dB (w/kHz); studies conducted by Working Party 9B indicate that this value will be exceeded by fixed systems in these bands. While it is necessary to develop technical and operational guidelines for the various services to share this spectrum in an effective manner, we request comment on sharing between services in this band. We also invite parties to comment on the timing for consideration of this issue; i.e. whether it is appropriate to consider this matter at WRC-95, or as the United States proposed at WRC-93, would it be more appropriate to consider this issue as part of a general treatment of space science matters at WRC-97?[31]

29. *Fixed Satellite Service use of the Band 13.75-14 GHz.* WARC-92 made a primary allocation for FSS in the 13.75-14 GHz band. This band is also allocated on a co-primary basis for radiolocation services and on a secondary basis for the space research, Earth exploration-satellite, and standard frequency and time signal-satellite services. Recognizing the difficulties encountered in sharing spectrum, WARC-92 also added to the international Radio Regulations footnote No. 855A, which specifies technical criteria necessary for the primary services to share this band, and footnote No. 855B, which grants equal status with FSS operations to geostationary space stations in the space research service that were advance published prior to January 31, 1992. Footnote 855B also stipulates that FSS stations shall not cause harmful interference to non-geostationary stations in the space research service prior to January 1, 2000. Resolution No. 112 (WARC-92) calls for the criteria specified in footnote 855A to be studied and for studies to be conducted regarding the technical compatibility between FSS and secondary allocations in the 13.75-14 GHz band. ITU-R Task Groups 4/4 and 7/3 have completed the studies called for under Resolution 112 and have reported to the ITU-R that the criteria in footnote Nos. 855A and 855B are appropriate. Considering this, we believe that this topic is timely for consideration at WRC-95. This is also consistent with the United States' position at WRC-93, where, because of radiolocation operations and space science operations conducted by the National Aeronautics and Space Administration's (NASA) in this band, the United States considered it important that Resolution 112 be addressed at WRC-95. Parties are invited to comment on issues associated with this agenda item.

30. *Space Services Allocations.* Resolution 712 adopted by WARC-92 requests consideration of the following issues relating to space science services: 1) providing worldwide primary allocations for the earth-exploration and space research services in appropriate bands within the 8-20 GHz range; 2) satisfying inter-satellite service requirements near 23 GHz; 3) providing spectrum for space-based active earth sensors around the 35 GHz band; and 4) including certain CCIR-developed space science service coordination param-

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[27] For example, in a September 21, 1993 FCC News release, the Commission announced that the FCC and NTIA had presented to the Department of State by letter joint recommendations for WRC-93 proposals. We noted that specific MSS bands had been agreed upon by the two agencies as U.S. proposals at WRC-93. We also noted that the use of other bands, not part of the WRC-93 proposals, were under continued discussion. Specifically, in the joint letter to Department of State, it was stated that the agencies "... will be continuing discussions on use of certain additional frequencies (312-315 MHz, 387-390 MHz, 1492-1525 MHz, 1675-1710 MHz) for MSS. See Attachments 2 and 3.

[28] *See Preliminary Spectrum Reallocation Report,* U.S. Department of Commerce, NTIA Special Publication 94-27, (February 1994), Section 4 at 14-17.

[29] Subject to certain restrictions; *see Preliminary Spectrum Reallocation Report,* U.S. Department of Commerce, NTIA Special Publication 94-27, 1994.

[30] In the United States, the 2025-2110 MHz band is allocated to the mobile service on a primary basis. Transmissions in the space research and earth exploration-satellite services are limited by footnote U.S. 90. *See* 47 CFR Section 2.106.

[31] The preliminary agenda for WRC-97 calls for that conference to consider Resolution 211 (WARC-92) concerning use of the 2025-2110 MHz and 2200-2290 MHz bands by mobile services, and sharing by the mobile and space services.

eters in Appendix 28 of the Radio Regulations. Examination of these issues at WRC-95 is limited to consideration of work carried out by the study groups, with the intention that any necessary action will be taken at WRC-97 as part of that conference's overall consideration of space science issues. Parties are invited to address the issues noted above, bearing in mind that substantive action is planned for WRC-97.

4. APPENDICES 30 AND 30A

31. Appendices 30 and 30A of the international Radio Regulations provide plans for the use of certain frequencies for the broadcasting-satellite service (BSS)[32] and associated feeder links.[33] Considering that the BSS plans for Regions 1 and 3 originated in 1977 and that they do not take into account many technological improvements which could make more efficient use of the spectrum and orbit resources, Resolution No. 524 (WARC-92) invited the CCIR to study the technical possibilities for improving the efficiency and flexibility of the BSS plans for Regions 1 and 3. Resolution 524 also notes that making more efficient use of spectrum and orbits may enable some countries, in particular those which have high rainfall climatic zones, to accommodate their BSS needs, or part of their needs, in the applicable band.[34] Resolution 524 also determined, however, that any changes to the plans for Regions 1 and 3 should not undermine the integrity of the plan for Region 2.[35]

32. Agenda item 3 a) of the recommended agenda for WRC-95 provides for initial consideration of Resolution 524 with a view to substantive actions being taken at WRC-97.[36] This agenda item was proposed and supported by administrations in Regions 1 and 3. At WRC-93, expressed its concern over possible effects on Region 2 plans. We believe that the current Region 2 plan is sufficiently flexible to meet Region 2 needs. Accordingly, we request comment on the steps necessary to insure that the integrity of Region 2 plans are maintained if changes are made to the plans for Regions 1 and 3. For example, how can the flexibility and capacity of Appendices 30 and 30A be increased without impact on Region 2? Should approaches be considered that are based upon a principle of reciprocity with Region 2? Currently, Appendices 30 and 30A contain a number of rigorous interregional sharing criteria. Can any of these sharing criteria be modified or eliminated without impact on Region 2; and if so, should corresponding provisions applicable to Region 2 also be modified?

33. In addition to emphasizing the need to protect the integrity of the Region 2 Plans as described in Resolution 524, agenda item 3 a) also notes that modifications to Appendices 30 and 30A should be made, "... with due regard to the advantage of taking into account, where practicable, the orbital arcs of Appendix 30B." This addition is intended to make it possible for an administration to implement its allotment in the FSS plan of Appendix 30B with the same satellite used to implement its allotment in the BSS plan in Appendices 30 and 30A. We request comment on the implications for the United States if the orbital arcs of Appendix 30B are taken into account in any replanning effort in Regions 1 and 3.

5. HIGH FREQUENCY BROADCASTING PLANNING

34. Prompted by increasing congestion of frequencies for High Frequency (HF) broadcasting and concerns by some countries that too few frequencies would be available to satisfy their broadcasting needs, the World Administrative Radio Conference in 1979 (WARC-79) resolved[37] that a future WARC should be convened to address planning of frequencies allocated for HF broadcasting. WARC-79 also allocated additional frequencies for use by HF broadcasting but made such use subject to provisions to be established by the HFBC WARC.[38] A two-session HFBC WARC (HFBC-84 and HFBC-87) was directed to develop a planning method and implement planning for HF broadcasting. HFBC-84 determined that a computerized method should be prepared to implement seasonal planning for HF Broadcasting. That session established the parameters to be used in planning. However, HFBC-87 was unable to implement planning because of the inability of the proposed planning algorithm to satisfy all planning parameters and, simultaneously, to satisfy all HFBC requirements submitted by various administrations. HFBC-87 instructed the International Frequency Registration Board (IFRB) to continue work on the computerized planning method. It also requested a future WARC, no later than 1992, to review, and if acceptable, to implement the planning process. An IFRB report presented to WARC-92, however, emphasized the difficulties experienced in satisfying all broadcasters' requirements. While WARC-92 did not directly address the process of planning the HF broadcasting bands, it did recognize the need for additional frequencies for HF broadcasting. Consequently, WARC-92 allocated additional frequencies for HF broadcasting subject to the planning provisions of a future WARC.[39]

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[32] The broadcasting-satellite service is a radiocommunication service in which signals transmitted or retransmitted by space stations are intended for direct reception by the general public.

[33] Appendix 30 contains provisions for BSS in the frequency bands 11.7-12.5 GHz in Region 1, 12.2-12.7 GHz in Region 2, and 11.7-12.2 GHz in Region 3. Appendix 30 A contains provisions for BSS feeder links in the frequency bands 14.5-14.8 GHz and 17.3-18.1 GHz in Regions 1 and 3, and 17.3-17.8 GHz in Region 2.

[34] 11.7-12.5 GHz for Region 1 and 11.7-12.2 for Region 3.

[35] Resolution 524 resolves 2 states:

"that the future conference shall ensure that the integrity of the Region 2 Plans and their associated provisions is preserved, by providing the same protection to the assignments contained in those Plans as they now receive under the relevant provisions of the Radio Regulations and by not requiring more protection from assignments in the Region 2 Plans than that currently provided under the Radio Regulations."

[36] *See Final Acts, supra*, agenda item no. 3.7.

[37] Resolution 508 (WARC-79).

[38] The bands allocated under this provision are 9775-9900 kHz, 11650-11700 kHz, 11975-12050 kHz, 13600-13800 KHz, 15450-15600 KHz, 17550-17700 kHz, and 21750-21850 kHz. *See* Footnote 531 to the international Radio Regulations.

[39] The bands allocated by WARC-92 in accordance with RR 521B are: 5900-5950 kHz, 7300-7350 kHz, 9400-9500 kHz, 11600-11650 kHz, 12050-12100 kHz, 13570-13600 kHz, 13800-13870 kHz, 15600-15800 kHz, 17480-17550 kHz, and 18900-19020 kHz. Use of these bands by the broadcasting service is limited to single-sideband operation (*see* RR 521A).

35. In the absence of "planning", the additional spectrum allocated by WARC-79 and WARC-92 will not become available on the implementation dates specified by those conferences despite the fact that actions have already been undertaken to vacate the WARC-79 allocations by other radio services.[40] Indeed, the original date for implementation of frequencies above 10 MHz allocated in WARC-79 has already passed (July 1, 1989), yet this spectrum remains unavailable because the conditions agreed on by HFBC-87 (i.e., adoption of a planning process) have not been satisfactorily completed.[41]

36. WRC-95 consideration of these issues may be somewhat limited. Agenda item 3 c) of the recommended agenda refers to "taking into account the work carried out by the study groups and the Conference Preparatory Meeting... with a view to WRC-97 taking action... [on the issue of] availability of the newly allocated HFBC bands." Radiocommunication Study Group 10 recently set up Task Group 10/5 to study and report on the technical and regulatory issues related to HFBC planning.[42] WRC-95 may take the opportunity to comment on the technical studies then underway. We note that major shortwave broadcasters now coordinate their actual use of the available HF broadcasting spectrum by voluntary consultations among administrations in accordance with Article 17 of the international Radio Regulations. Recently, the United States has supported efforts to implement a planning procedure based on an improved Article 17, perhaps through recognizing the International Broadcasters' HF Coordination Conference (HFCC), a group comprised of international HF broadcasters, as the body charged with coordinating HF broadcast spectrum use. The experiences of the HFCC could influence considerations by Task Group 10/5.

37. In the past, broadcasters have expressed great interest in actions that can be undertaken to make available expeditiously the HF spectrum allocated to HF broadcasting by WARC-79 and WARC-92. In view of the forthcoming work of the task group and limited consideration by WRC-95, we request comment on the alternatives that can satisfy broadcasters' requirements and the established conditions for use of the HFBC allocations.

B. Preliminary Agenda for the 1997 World Radiocommunication Conference

38. As part of the four year conference planning cycle WRC-93 recommended a preliminary agenda for WRC-97. A final agenda for WRC-97 will be recommended at WRC-95. In this *NOI* we solicit comment to refine U.S. positions relative to implementing the preliminary WRC-97 agenda.

39. It is possible that a considerable portion of the 1997 conference could be reserved (by WRC-95) for unresolved WRC-95 issues. For example, the preliminary agenda for WRC-97 already anticipates further consideration of mobile satellite service issues; action to modify Appendices 30 and 30A of the international Radio Regulations as they pertain to Regions 1 and 3; consideration of a number of space service allocation issues; and, action on the WARC-79 and WARC-92 allocations for the HF broadcasting service.[43] In addition to items carried over from WRC-95, WRC-97 is scheduled to consider a number of maritime, aeronautical, and satellite science services issues.[44] Further, WRC-97 is scheduled to include consideration of implementing wind profiler radar systems at appropriate frequencies,[45] and simplification of the process for bringing into use multi-band and/or multi-service satellite networks.[46]

40. The number of issues included on the preliminary agenda for WRC-97 may make it difficult to dedicate the time and resources necessary to consider fully each issue. Therefore, parties should address whether items now listed on the preliminary agenda are timely for consideration in 1997, or whether it would be appropriate to delay their consideration to a future conference. Parties should also address items that do not appear on the preliminary agenda for WRC-97, but that would be mature for consideration at the 1997 conference. Those who address WRC-97 should note that U.S. proposals and positions for 1997 will be refined further in subsequent NOIs. Therefore, comments regarding issues for the WRC-97 agenda should generally be limited to fully developed topics of significance to the United States.

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[40] The spectrum allocations made by WARC-79 above 10 MHz were effective July 1, 1989, and the allocations below 10 MHz are to be effective July 1, 1994, *see* Resolution No. 8, Annex A, paragraph 17. The allocations made by WARC-92 are to be effective April 1, 2007, *see* RRs 521C, 528A, 529B and 534A, and Resolution 523 (WARC-92).

[41] *See* Resolution No. 512 (HFBC-87).

[42] The Radiocommunication Assembly adopted, as part of its work program, a "Question" outlining issues to study relative to planning for HF broadcasting. Task Group 10/5 will prepare a report on "planning" the HF broadcasting bands in response to the Question taking account of the earlier work of the IFRB.

[43] Items 3.7, 2.1, and 3.3 respectively, of the preliminary agenda for WRC-97, Final Acts WRC-93.

[44] *See* Preliminary Agenda for WRC-97, WRC-93 *Final Acts*, for a comprehensive list of issues to be considered at WRC-97.

[45] Recommendation No. 621 (WARC-92), item 2.2 on preliminary agenda for WRC-97. CCIR studies previously have focused on frequencies near 50 MHz, 400 MHz, and 1000 MHz. The Commission also has an outstanding rule making to consider this issue. Notice of Proposed Rule Making and Notice of Inquiry, Amendment of Section 2.1-6 of the Commission's Rules to Allocate Spectrum for Wind Profiler Radar Systems, ET Docket No. 93-59, 8 FCC Rcd 2546 (1993).

[46] Item 2.2 on preliminary agenda for WRC-97, includes considering and acting upon Recommendation No. 715 (Orb-88). Recommendation No. 715 relates to multi-band/multiservice satellite networks in geostationary orbit. Although not specifically included on the preliminary agenda for WRC-97, Recommendation No. 719 (WARC-92) is related to Recommendation No. 715. It notes that certain bands are allocated on a primary basis for both the fixed-satellite and mobile-satellite services and recommends that studies be carried out on the technical characteristics and sharing criteria necessary for multi-service satellite networks in those frequency bands. Recommendation No. 719 further recommends that a future conference consider a single service definition encompassing mobile-satellite and fixed-satellite service applications. Establishment of such a general satellite service was proposed by the United States at WARC-92. However, that conference adopted a compromise proposal that included Recommendation No. 719. This matter was not included in the current agendas for WRC-95 and WRC-97. Parties should address whether consideration of Recommendation No. 719 should again be proposed for WRC-97.

C. Preliminary Views on the 1999 World Radiocommunication Conference

41. In accordance with the ITU's four-year conference planning cycle, WRC-95 is directed to give to the Council its views on a preliminary agenda for the 1999 WRC. We invite parties to submit their views on issues for a preliminary agenda for the 1999 WRC. Those commenting should bear in mind that preceding conferences could have unresolved issues that carry over to the 1999 WRC and to subsequent conferences. Also note that U.S. proposals and positions for agenda items for the 1999 WRC will be refined further in subsequent FCC proceedings.

D. Other WRC Planning Activities

42. *Industry Advisory Committee.* In parallel with its NOI proceeding, the Commission will establish an industry advisory committee (IAC) to develop independent private sector proposals and positions on agenda items contained in the WRC-93 Final Acts. The IAC will be chaired by a member of the private sector and will meet periodically to carry out its work. Meetings will be announced by Public Notice. The final product of the IAC will likely be a "Report" giving the IAC's views on U.S. proposals and positions for WRC-95. The FCC, in consultation with NTIA and the Department of State, will take account of the IAC's report when developing final U.S. proposals and positions to WRC-95.

43. *Conference Preparatory Meetings.* Another result of the ITU restructuring is the institution of a conference preparation structure within the ITU's Radiocommunication Sector. This structure identifies tasks and studies relative to WRC agenda items and assigns the tasks and studies to the appropriate ITU study groups, working parties and task groups who report results to Conference Preparatory Meetings (CPMs). The first CPM was held in February 1994 and produced an outline for the report of the next CPM (CPM-95) to WRC-95 that will be held March 22-April 5, 1995, in Geneva. That report is expected to provide a technical basis[47] for consideration of nearly all WRC-95 topics.[48]

44. *FCC Preparations For Future WRCs.* The ITU's High Level Committee emphasized strongly the need for the ITU to establish regular processes for planning and decision making.[49] As the ITU has now moved to regularize the convening of WRCs on a biennial basis, we find it appropriate to consider our own process of preparing for radio conferences. In the past, we have solicited public input as-needed to address the specific topics of impending conferences. The ITU's new organization and cheduling of conferences will likely require a continuous process of conference preparation, particularly considering the lead time required to develop proposals for any given conference. We wish to be able to be more responsive to developing needs of industry so that U.S. interests can be identified on a timely basis and properly represented at WRCs and the related activities.[50] Therefore, we believe that it would be appropriate for us to establish a regularized process for conference preparations, including maintenance of an open docket in this *NOI*.[51] Parties are invited to comment on such procedural matters (e.g., establishment of a permanent FCC conference preparatory structure) that may facilitate timely consideration of public views on conference preparations now and in the future.

PROCEDURAL MATTERS

Ex Parte Rules - Exempt Proceeding

45. Pursuant to Section 1.1204 (a) (4) of the Commission's Rules, 47 CFR Section 1.1204 (a) (4), no *ex parte* restrictions apply to this proceeding.

Comment Dates

46. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **June 6, 1994**, and reply comments on or before **June 27, 1994**. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments

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[47] The CPM was initially envisioned to provide to WRCs information of primarily a technical or operational nature. However, the expanded terms of reference of ITU-R study group activities also allow for considering topics of a regulatory/procedural nature. Moreover, the Radiocommunication Assembly decided that a Working Party of the CPM should carry out studies related to regulatory/procedural matters; the recently concluded first session of the CPM adopted terms of reference for that Working Party.

[48] *See Structure of the Consolidated Report of the ITU-R Conference Preparatory Meeting (CPM-95) to the World Radiocommunication Conference, 1995,* ITU Document CPM94/22, Geneva (1994).

[49] *See* Report of the High Level Committee [HLC] to review the structure and functioning of the ITU, Geneva (1991). The HLC recommended that the ITU place greater emphasis on strategic planning, and that radio conferences develop recommended agendas for at least a four-year cycle of conferences. Most of the HLC recommendations have been adopted by the ITU and incorporated into the Constitution and Convention or otherwise implemented through established mechanisms.

[50] We note that while this *NOI* was in preparation *sua sponte*, a "Petition to Institute Notice of Inquiry' and, as Appropriate, Establish an Industry Advisory Committee In Preparation For the *!995 World Radiocommunication Conference* " was filed by AMSC Subsidiary Corporation, COMSAT Corporation, Iridium, Inc., Loral-Qualcomm Satellite Services, Inc., Motorola, Inc., Orbital Communications Corporation, STARSYS Global Positioning, Inc., and TRW Inc. This *NOI* substantially responds to the request in that petition and the petition will be entered into the record in this proceeding.

[51] We note that recently, NTIA, under the auspices of its Interdepartment Radio Advisory Committee (IRAC), has established a "Radio Conference Subcommittee" (RCS). The RCS will coordinate the views of federal agencies on future WRCs and present its own draft conference proposals. This group is expected to emphasize the interests of the Executive Branch in U.S. conference preparations. Coordination of RCS views with Commission views will be accomplished through participation of FCC staff in a liaison capacity.

will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, DC 20554.

Ordering Clause

47. Authority for issuance of this *Notice of Inquiry* is contained in Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

Contact Person

48. For further information concerning this proceeding, contact Damon C. Ladson, Office of International Communications, (202) 632-0935; or, Steve Sharkey, Office of Engineering and Technology, (202) 653-8151.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

ATTACHMENT 1: Excerpt from the Final Acts of the
World Radiocommunication Conference (Geneva, 1993)

RESOLUTION No. [COM4/1]

Agenda for the 1995 World Radiocommunication Conference

The World Radiocommunication Conference (Geneva, 1993),

considering

a) Resolutions 8 and 9 of the Additional Plenipotentiary Conference, (Geneva, 1992);

b) Article 13 of the Constitution (Geneva, 1992) regarding the competence and scheduling of world radiocommunication conferences and Article 7 of the Convention (Geneva, 1992) regarding their agendas;

c) the relevant resolutions and recommendations of previous world administrative radio conferences;

d) the recent technological advances in the field of broadcasting,

recognizing

a) that the work of the Voluntary Group of Experts (VGE) should be considered and implemented as quickly as possible, to ensure that future decisions of the Radiocommunication Sector are made within the framework of any new substance, structure or arrangement of the Radio Regulations;

b) that activities related to implementation of the decisions of the World Administrative Radio Conference (Malaga-Torremolinos, 1992) concerning the mobile-satellite service (MSS) indicate that some of those decisions may require further consideration;

c) that the provision of feeder links is an integral aspect of facilitating the use of the frequency bands allocated to the MSS,

recognizing further

a) that there are a limited number of other issues which can be considered at the 1995 World Radiocommunication Conference (WRC-95) without affecting consideration of VGE and MSS issues;

b) the need to maintain and protect other services to which the frequency bands to be considered by WRC-95 are also allocated,

resolves

to recommend to the Council that a world radiocommunication conference be held in Geneva in late 1995 for a period of four weeks, with the following agenda:

1. to review the final report of the VGE, and to consider related proposals from administrations, in order to undertake, as appropriate, a revision of the Radio Regulations and to provide a timetable for the implementation of outstanding recommended actions;

2. on the basis of proposals by administrations and the report from the Conference Preparatory Meeting:

2.1 with a view to facilitating the use of frequency bands allocated to the mobile-satellite services and with due regard to existing services to which the frequency spectrum to be considered by the Conference is also allocated:

a) review the technical constraints associated with the frequency bands allocated below 3 GHz to mobile-satellite services and associated provisions, resolutions and recommendations;

b) review the date of entry into force of allocations in the bands 1 980 - 2 010 MHz and 2 170 - 2 200 MHz in Regions 1 and 3 and the bands 1 970 - 2 010 MHz and 2 160 - 2 200 MHz in Region 2;

c) consider allocations and regulatory aspects for feeder links for the mobile-satellite services taking account of the interference that may be caused to satellite systems in the geostationary-satellite orbit;

2.2 to consider power limits for earth stations in the Earth exploration-satellite, space research, and space operation services in the band 2 025 - 2 110 MHz;

2.3 to review Resolution No. 112 in the light of the results of studies carried out in application of that Resolution and take appropriate action;

3. to consider the following items, taking into account the work carried out by the study groups and the Conference Preparatory Meeting of the Radiocommunication Sector, with a view to WRC-97 taking action, as appropriate:

a) Appendices 30 and 30A for Regions 1 and 3 in response to Resolution No. 524 (WARC-92), and taking particular account of **resolves** 2 of that Resolution and with due regard to the advantage of taking into account, where practicable, the orbital arcs of Appendix 30B;

b) Resolution No. 712 (WARC-92);

c) the availability of the newly allocated HFBC bands;

d) requirements for the MSS and associated feeder links and, if necessary, adopt in 1995 limited allocations;

4. to consider such consequential changes and amendments to the Radio Regulations as may be necessitated by the decisions of the Conference;

5. in accordance with Resolution No. 94 (WARC-92), to review those resolutions and recommendations of world administrative radio conferences which are relevant to **resolves** 1 to 4 above with a view to their possible revision, replacement or abrogation;

6. in accordance with Article 7 of the Convention (Geneva, 1992):

6.1 to consider and approve the report of the Director of the Radiocommunication Bureau on the activities of the Radiocommunication Sector since the last conference;

6.2 to recommend to the Council the agenda for the 1997 World Radiocommunication Conference, and to give its views on the preliminary agenda for the 1999 Conference and on possible agenda items for future conferences;

6.3 to identify those items requiring priority action by the radiocommunication study groups.

invites administrations

when preparing and submitting their proposals to WRC-95 relating to the simplification of the Radio Regulations or to matters relating to the agenda contained in this Resolution, to base them as far as practicable on the recommended texts in the final report of the VGE,

invites the Council

to establish the agenda and make provision for WRC-95 and to initiate as soon as possible the necessary consultation with Members,

instructs the Director of the Radiocommunication Bureau

to make the necessary arrangements to convene meetings of the Conference Preparatory Meeting in accordance with decisions of the Radiocommunication Assembly, (Geneva, 1993), and to prepare a report to WRC-95,

instructs the Secretary-General

to communicate this Resolution to concerned international and regional organizations.

RESOLUTION No. [COM4/2]

Preliminary Agenda for the 1997 World Radiocommunication Conference

The World Radiocommunication Conference (Geneva, 1993),

considering

that in accordance with Nos. 118 and 126 of the Convention (Geneva, 1992) and having regard to Resolution 1 of the Additional Plenipotentiary Conference (Geneva, 1992), the general scope of the agenda for the 1997 World Radiocommunication Conference (WRC-97) should be established four years in advance;

considering further

a) Resolution 9 of the Additional Plenipotentiary Conference (Geneva, 1992);

b) Article 13 of the Constitution (Geneva, 1992) regarding the competence and scheduling of world radiocommunication conferences and Article 7 of the Convention (Geneva, 1992) regarding their agendas;

c) the relevant resolutions and recommendations of previous world administrative radio conferences,

resolves to give the view

that the following items should be included in the preliminary agenda of WRC-97, to be held in late 1997:

1. to take appropriate action in respect of those urgent issues that were specifically requested by the 1995 World Radiocommunication Conference (WRC-95);

2. to consider and take appropriate action in respect of the topics referred to in the following resolutions and recommendations:

2.1 Resolutions Nos. 60 (WARC-79), 211 (WARC-92), 710 (WARC-92) and 712 (WARC-92);

2.2 Recommendations Nos. 66(Rev. WARC-92), 621 (WARC-92), 711 (WARC-92) and 715 (Orb-88);

3. based on proposals by Members of the Union, and taking account of the results of WRC-95, to review and, where necessary, revise the provisions of the Radio Regulations with respect to the following topics:

3.1 unresolved and other pressing issues concerning frequency allocations and regulatory aspects as related to the mobile-satellite services, including allocations for feeder links for mobile-satellite services as appropriate;

3.2 other frequency allocation issues for the space services which are not covered in the above-mentioned Resolutions, as follows:

3.2.1 allocation of frequency bands above 50 GHz to the Earth exploration-satellite (passive) service;

3.2.2 frequency allocations and associated provisions for the band 399.9 - 400.05 MHz;

3.3 examination of, and taking necessary decisions on, the question of the HF bands allocated to the broadcasting service in the light of developments to date and the results of the studies carried out by the Radiocommunication Sector;

3.4 consideration of the possible deletion of all secondary and permitted allocations from the band 136 - 137 MHz, which is allocated to the aeronautical mobile (R) service on a primary basis, in accordance with Resolution No. 408 (Mob-87) and in order to meet the special needs of the aeronautical mobile (R) service;

3.5 the provisions of Chapters IX and N IX, as stipulated in Resolution No. 331 (Mob-87) and appropriate action in respect of the issues dealt with in Resolutions Nos. 200 (Mob-87), 210 (Mob-87) and 330 (Mob-87) taking into account that the global maritime distress and safety system (GMDSS) shall be fully implemented in 1999;

3.6 the following matters related to the maritime mobile and maritime mobile-satellite services:

3.6.1 the use of the Appendix 18 VHF frequency band for maritime mobile communications;

3.6.2 Article 61 relating to the order of priority of communications in the maritime mobile service and in the maritime mobile-satellite service;

3.7 Appendices 30 and 30A for Regions 1 and 3 in response to Resolution No. 524 (WARC-92), and taking particular account of **resolves** 2 of that Resolution;

4. to consider the report of the Director of the Radiocommunication Bureau on the activities of the Radiocommunication Sector since the last Conference;

5. to recommend to the Council items for inclusion in the agenda of the 1999 World Radiocommunication Conference and give its views on the preliminary agenda for the 2001 World Radiocommunication Conference;

6. to consider such consequential changes and amendments to the Radio Regulations as may be necessitated by the decisions of the Conference;

7. in accordance with Resolution No. 94 (WARC-92), to review those resolutions and recommendations of world administrative radio conferences which are relevant to **resolves** 1 to 6 above with a view to their possible revision, replacement or abrogation,

invites the Council

to consider the views given in this Resolution,

instructs the Director of the Radiocommunication Bureau

to make the necessary arrangements to convene meetings of the Conference Preparatory Meeting and to prepare a report to WRC-97,

instructs the Secretary-General

1. to communicate this Resolution to WRC-95;

2. to communicate this Resolution to concerned international and regional organizations.

RECOMMENDATION No. [PL/1]

Convening of a Regional Radiocommunication Conference to Review the Regional Agreement Concerning the Use by the Broadcasting Service of Frequencies in the Medium Frequency Bands in Regions 1 and 3 and in the Low Frequency Bands in Region 1 (Geneva, 1975)

The World Radiocommunication Conference (Geneva, 1993),

considering

a) that the Regional Agreement Concerning the Use by the Broadcasting Service of Frequencies in the Medium Frequency Bands in Regions 1 and 3 and in the Low Frequency Bands in Region 1 (hereinafter referred to as "the Agreement") will remain in force beyond the date foreseen for its revision;

b) that over a period of nearly 15 years substantial modifications have been made to the Geneva 1975 Plan following the application of Article 4 of the Agreement;

c) that the geopolitical map in Regions 1 and 3 has undergone significant changes, requiring means to resolve unforeseen problems in parts of those Regions;

d) that the procedure of Article 4 of the Agreement may need to be reviewed in the light of the simplifications of the Radio Regulations that may be adopted by the 1995 World Radiocommunication Conference (WRC-95) following consideration of the report of the Voluntary Group of Experts (VGE),

recommends the Council

1. to consider convening a regional radiocommunication conference with the following agenda:

   to revise Article 4 of the Agreement, taking account of the decisions of WRC-95 relating to the recommendations of the VGE and to adopt any additional provisions that may assist countries in resolving local problems without affecting assignments in the Plan, except with the agreement of the countries concerned;

2. to plan this Conference at an appropriate date following consultation of the administrations concerned.

RECOMMENDATION No. [PL/2]

Mobile-Satellite Service Networks Published Under Resolution No. 46 (WARC-92)

The World Radiocommunication Conference (Geneva, 1993),

considering

a) that the World Administrative Radio Conference (WARC-92) allocated the frequency bands 1 970 - 2 010 MHz and 2 160 - 2 200 MHz in Region 2 and 1 980 - 2 010 MHz and 2 170 - 2 200 MHz in Regions 1 and 3 to the mobile-satellite service (MSS) on a primary basis as of 2005;

b) that this Conference recommends the Council to include a review of the above date in the agenda of the 1995 World Radiocommunication Conference (WRC-95);

c) that some administrations have expressed the wish to start the coordination procedure contained in Resolution No. 46 (WARC-92) as soon as possible due to the long time that may be required for the completion of that coordination;

d) that some administrations have already submitted information on projected MSS networks,

recognizing

that administrations shall comply with the provisions of the Final Acts of WARC-92 without prejudice to the decisions to be taken by WRC-95 in respect of the matters referred to under **considering** above,

recommends

that WRC-95 consider the status of those MSS satellite networks in the bands listed in **considering** a) which have been published before WRC-95,

invites administrations

to cooperate in coordination consultations referred to in **considering** c) above.

ATTACHMENT 2

September 17, 1993

Mr. Richard C. Beaird
Acting U.S. Coordinator
and Director
International Communications
and Information Policy (CIP)
Department of State
2201 C Street, NW
Washington, DC 20520

Dear Mr. Beaird:

We are pleased to forward the attached joint recommendations for the United States proposals to the 1993 World Radiocommunication Conference (WRC'93) to be held this November in Geneva. WRC'93 is being convened to plan the agendas for future conferences scheduled in 1995 and 1997. We request that the attached joint recommendations be forwarded to the International Telecommunication Union as a conference proposal of the United States to WRC'93. There may be additional proposals at a later date.

The joint recommendations reflect those topics that we now agree should be included on the 1995 and 1997 agendas. These conferences should focus on accommodation of the needs of the Mobile Satellite Service (MSS), the work of the Voluntary Group of Experts (VGE) which is looking toward simplification of the Radio Regulations, and space related matters. We will be continuing discussions on use of certain additional frequencies (312-315 MHz, 387-390 MHz, 1492-1525 MHz, 1675-1710 MHz) for MSS.

Sincerely,

James H. Quello
Chairman
Federal Communications
Commission

Larry Irving
Assistant Secretary of
Commerce for Communications
and Information

NEWS

ATTACHMENT 3

News media information 202 632-5050
Recorded listing of releases and texts
202 632-0002

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET, N.W.
WASHINGTON, D.C. 20554

This is an official announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F 2d 385 (D.C. Circ. 1974)

September 21, 1993

FCC AND NTIA PRESENT JOINT RECOMMENDATIONS FOR WRC-93

On Friday, September 17, in a joint letter to the Department of State, the FCC and NTIA (the National Telecommunications and Information Administration), forwarded their recommendations on proposals concerning the forthcoming International Telecommunication Union (ITU) World Radiocommunication Conference (WRC-93) to be held at ITU headquarters in Geneva, Switzerland, over the period November 15-19, 1993.

World Radiocommunication Conferences are typically empowered to modify the international Radio Regulations. The WRC-93 will be primarily a planning meeting to develop agendas for future conferences in 1995 and 1997. On June 24, 1993, the Commission initiated a Notice of Inquiry on this matter (ET Docket 93-198) and received comments on topics of priority interest for consideration at ITU WRCs.

The joint letter, signed by FCC Chairman Quello and NTIA Administrator Larry Irving, states that the forthcoming conferences should focus on accommodation of the needs of the Mobile-Satellite service (MSS), the work of the Voluntary Group of Experts (VGE) looking toward simplification of the Radio Regulations, and space related matters. The specific agenda recommendations are being forwarded to the Department of State in a form that could be presented as proposals to the WRC-93. The proposed agenda for the 1995 WRC includes specific MSS bands agreed upon by the FCC and the NTIA; the letter notes that discussions are continuing on use of certain additional frequencies for the MSS.

-- FCC --

Office of International Communications contact: Thomas M. Walsh at (202) 632-0935

International Telecommunication Union
World Radiocommunication Conference (WRC-93)
Geneva
15 - 19 November 1993

United States of America

Relating to the Agenda for the
1995 World Radiocommunication Conference

1. The 1993 World Radiocommunication Conference has the mandate to recommend to the Council an agenda for the 1995 World Radiocommunication Conference. The Council instructed WRC-93 to include in its deliberations consideration of matters related to facilitating use of frequency bands for the mobile-satellite service (MSS), and a review of the Radio Regulations on the basis of a report of the Voluntary Group of Experts (VGE). We have reviewed these matters and many other issues pending within the ITU Radiocommunication Sector, and have developed the attached proposal for the agenda for the WRC-95.

2. Progress was achieved at WARC-92 toward addressing the needs of the MSS; however, the spectrum needs of this service remain unresolved. Since WARC-92, there have been further studies initiated in the Radiocommunication Study Groups as well as within administrations and various organizations. In view of these activities, we believe that certain issues can be addressed productively at WRC-95. We have therefore included specific items on the proposed agenda for WRC-95 related to the mobile-satellite services and the requirements for associated feeder links. Moreover, we recommend that the conference undertake a broader assessment of MSS and related feeder link requirements in its development of a preliminary agenda for WRC-97.

3. We recognize that the VGE is preparing a report to be issued by the middle of next year, outlining its recommendations on the simplification of the Radio Regulations. Therefore, as requested by the Additional Plenipotentiary Conference (see Resolution No. 8, APP, Geneva, 1992), and further directed by the Council, we consider it timely to include consideration of the VGE report on the agenda for WRC-95.

4. Finally, there are a few additional topics that we believe may be treated relatively easily. Among these are Resolution No. 112 and Recommendation No. 318. Studies on these matters have been carried out in the Radiocommunication Study Groups, and the WRC-95 should consider possible actions in view of the current technical information.

ATTACHMENT: Recommendation No. USA-1

Recommendation No. USA-1

Relating to the Agenda for the
1995 World Radiocommunication Conference

The World Radiocommunication Conference, Geneva, 1993,

considering

a) that the Additional Plenipotentiary Conference, Geneva, 1992, decided that World Radiocommunication Conferences shall normally be convened every two years;

b) that the Additional Plenipotentiary Conference, Geneva, 1992, through Resolution No. 9, took the necessary steps to convene a World Radiocommunication Conference in 1993;

c) that the Additional Plenipotentiary Conference, Geneva, 1992, through Resolution No. 8, instructed the Council to convene a World Radiocommunication Conference in the second half of 1995;

d) that the Additional Plenipotentiary Conference, Geneva, 1992, through Resolution Nos. 8 and 9, instructed the Council to include certain items on the agenda of the 1995 World Radiocommunication Conference;

taking into account

a) the decision of the 47th Session of the Council, circulating to Members an agenda for the 1993 WRC;

b) that this decision was adopted by the Members of the Union;

recommends

that the Council include on the 1995 WRC agenda the following items:

1. based on proposals from Members of the Union, review, and where necessary revise, the provisions of the Radio Regulations with respect to the following topics:

1.1 frequency allocations and associated provisions of the regulations relating to mobile-satellite services, in order to facilitate their use of the following bands

- 137-138 MHz;
- 148-150.05 MHz
- 400.15-401 MHz
- 1525-1559 MHz
- 1610-1626.5 MHz
- 1626.5-1660.5 MHz
- 1970-2010 MHz
- 2160-2200 MHz
- 2483.5-2500 MHz

1.2 frequency allocations and associated provisions of the regulations relating to the fixed-satellite service in order to facilitate the use of the fixed-satellite service for feeder links for mobile-satellite services;

1.3 frequency allocations and associated provisions for the band 399.9-400.05 MHz;

1.4 Article 61 relating to the Order of Priority of Communications in the Maritime Mobile Service and in the Maritime Mobile-Satellite Service;

1.5 appropriate provisions to indicate that maritime mobile and maritime mobile-satellite distress, urgency and safety communications should not be conducted in frequency bands where the GMDSS is not applicable;

1.6 appropriate provisions for implementing the mobile satellite services in the 1545-1559 MHz and 1646.5-1660.5 MHz bands including the need for priority access for stations providing aeronautical mobile-satellite (R) services;

1.7 Resolution No. 112 (WARC-92) relating to Allocation of Frequencies to the Fixed Satellite Service in the Band 13.75 - 14 GHz;

1.8 Recommendation No. 318 (Mob-87) relating to Improved Efficiency in the Use of the Appendix 18 VHF Frequency Spectrum for Maritime Mobile Communications;

1.9 such consequential changes and amendments in the Radio Regulations as may be necessitated by the decisions of the Conference;

2. consider, and take appropriate action upon the Final Report and Recommendations of the Voluntary Group of Experts;

3. assess spectrum requirements for mobile-satellite services and related feeder links to be taken into account in the development of a preliminary agenda for WRC-97;

4. consider, revise as necessary, and take other appropriate action upon the relevant Recommendations and Resolutions;

5. consider the report of the Director of the Radiocommunication Bureau on the activities of the Radiocommunication Sector since the last conference;

6 recommend to the Council items for inclusion in the agenda of the 1997 WRC.

7 recommend a preliminary agenda for the 1999 WRC.

requests the Director of the Radiocommunication Bureau

to ensure that the necessary studies and reports are prepared in advance of the conference;

instructs the Secretary-General

to bring this Recommendation to the attention of the Council so that an agenda for the 1995 WRC can be circulated to Members as far in advance of the conference as possible.

REASON: **To recommend to the Council an agenda for the 1995 WRC based upon the directions from the Additional Plenipotentiary Conference (Geneva, 1992) and urgent requirements.**

International Telecommunication Union
World Radiocommunication Conference (WRC-93)
Geneva
15 - 19 November 1993

United States of America

Relating to the Preliminary Agenda for the 1997 World Radiocommunication Conference

It is the view of the United States that the preliminary agenda for the 1997 World Radiocommunication Conference should address any unresolved issues relating to frequency allocations and associated provisions for mobile-satellite services, including feeder links. The conference should also address several unresolved issues relating to the space services. Other matters that should be treated by the 1997 WRC include the use of the HF bands allocated to the broadcasting service, spurious emission levels, wind profiler radars, mobile service sharing around 2 GHz, and use of the VHF band allocated by the 1979 WARC to the aeronautical mobile (R) service.

ATTACHMENT: Recommendation No. USA-2

Recommendation No. USA-2

Relating to the Preliminary Agenda for the
1997 World Radiocommunication Conference

The World Radiocommunication Conference, Geneva, 1993,

considering

a) that the Additional Plenipotentiary Conference, Geneva, 1992, decided that World Radiocommunication Conferences shall normally be convened every two years;

b) that the Additional Plenipotentiary Conference, Geneva, 1992, through Resolution No. 9, took the necessary steps to convene a World Radiocommunication Conference in 1993;

c) that the Additional Plenipotentiary Conference, Geneva, 1992, through Resolution No. 9, instructed the 1993 World Radiocommunication Conference to make recommendations to the Council for the preliminary agenda for the 1997 World Radiocommunication Conference;

taking into account

a) the decision of the 47th Session of the Council, circulating to Members an agenda for the 1993 WRC;

b) that this decision was adopted by the Members of the Union;

considering further

that there are a number of unresolved issues concerning the mobile-satellite and space related services;

recommends

that the following items be included on a preliminary agenda for the 1997 WRC:

1. based on proposals from Members of the Union, review, and where necessary revise, the provisions of the Radio Regulations with respect to the following topics:

1.1 frequency allocations and associated provisions of the regulations relating to mobile-satellite services, including allocations for feeder links for mobile-satellite services, taking account of the results of the 1995 WRC;

1.2 allocation of frequency bands above 50 GHz to the Earth exploration-satellite service;

1.3 examination of the use of the HF bands allocated to the broadcasting service, in light of developments to date;

1.4 Resolution No. 60 Relating to Information on the Propagation of Radio Waves Used in the Determination of the Coordination Area;

1.5 Resolution No. 211 (WARC-92) relating to Use by the Mobile Service of the Frequency Bands 2025-2110 MHz and 2200-2290 MHz;

1.6 Resolution No. 408 (MOB-87) relating to Use of the Band 136-137 MHz by Services other than the Aeronautical Mobile (R) Service;

1.7 Resolution No. 710 (WARC-92) relating to Primary Service Requirements for the Meteorological-Satellite and Earth Exploration-Satellite Services in the Band 401-403 MHz;

1.8 Resolution No. 712 (WARC-92) relating to Consideration by a Future Competent World Administrative Radio Conference of Issues Dealing with Allocations to Space Services Which Were not Placed on the Agenda of WARC-92;

1.9 Recommendation No. 66 Relating to Studies of the Maximum Permitted Levels of Spurious Emissions;

1.10 Recommendation No. 621 (WARC-92) relating to Implementation of Wind Profiler Radars at Frequencies near 50 MHz, 400 MHz and 1000 MHz;

1.11 Recommendation No. 711 Relating to the Coordination of Earth Stations;

1.12 Recommendation No. 715 (ORB-88) relating to Multi-band and/or Multiservice Satellite Networks Using the Geostationary-Satellite Orbit;

1.13 Recommendation No. 719 (WARC-92) relating to Multiservice Satellite Networks Using the Geostationary-Satellite Orbit;

1.14 such consequential changes and amendments in the Radio Regulations as may be necessitated by the decisions of the Conference;

2. consider, revise as necessary, and take other appropriate action upon the relevant Recommendations and Resolutions;

3. consider the report of the Director of the Radiocommunication Bureau on the activities of the Radiocommunication Sector since the last conference;

4. recommend to the Council items for inclusion in the agenda of the 1999 WRC;

5. recommend a preliminary agenda for the 2001 WRC;

requests the Director of the Radiocommunication Bureau

a) to ensure that the necessary studies and reports are prepared in order to give advice to the 1997 WRC;

b) to report to the 1995 WRC on the progress of studies on those items enumerated above for inclusion on the 1997 WRC agenda.

Reason: To recommend a preliminary agenda for the 1997 WRC based on current needs.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 93-438

In the Matter of	)	
	)	
Liability of AVI	)	
Systems, Inc.	)	NAL/Acct. No. 215CG0005
Emeryville, California	)	
for a forfeiture	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 1993 ; **Released:** October 15, 1993

By the Commission:

1. INTRODUCTION

1. Before the Commission is an Application for Review submitted under Section 1.115 of the Federal Communications Commission's (FCC) rules and dated July 28, 1992, from AVI Systems, Inc. (AVI), Emeryville, California. 47 C.F.R. Section 1.115. The application requests from the Commission "a reversal of the assessment" of a $5,600 monetary forfeiture penalty that had been issued by the FCC's Chicago Office to AVI. As explained below, the Commission affirms this penalty.

II. BACKGROUND

2. From April 6-9, 1992, AVI was displaying an "AVI ANB3-386SXL-25 Notebook Computer" at the Spring 92 COMDEX computer trade show in Chicago, Illinois. An FCC inspector observed that this computer did not have a label reflecting that it had been authorized by the FCC. Furthermore, there was not a conspicuous notice near the computer stating that it had not been authorized by the FCC and could not be offered for sale until authorized by the FCC.

3. On May 20, 1992, the FCC's Chicago Office issued a Notice of Apparent Liability for a $7,000 monetary forfeiture penalty to AVI for willfully violating Section 302(b) of the Communications Act of 1934 and Section 2.803 of the FCC's rules. 47 U.S.C. Section 302(b), 47 C.F.R. Section 2.803. The Notice was issued because AVI had displayed a computer that had not been authorized by the FCC. AVI responded on June 10, 1992. On June 26, 1992, the FCC's Chicago Office issued AVI a Notice of Forfeiture for a $5,600 monetary forfeiture penalty. The FCC's Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339 (1992) petition for review pending sub nom. USTA v. FCC, No. 92-1321 (D.C. Cir. filed July 30, 1992) recommends $7,000 as the base forfeiture amount for

this type of violation, and provides criteria for reducing forfeitures which the FCC's Chicago Office applied to arrive at the $5,600 penalty.

4. Section 302 of the Communications Act authorizes the FCC to regulate the interference potential of radio frequency devices, and prohibits the marketing of devices that fail to comply with the FCC's rules. Section 2.803 of the FCC's rules prohibits the marketing, including the displaying and advertising, of radio frequency devices that have not received FCC authorization. Personal computers must be authorized by the FCC. 47 C.F.R. Sections 15.3(i), (r) and (s), and 15.101. Furthermore, FCC authorized devices must have a label, which includes an FCC identifier, reflecting that the devices have been authorized by the FCC. 47 C.F.R. Sections 2.925, 2.926 and 15.19. However, Section 2.803 provides a limited exemption that allows an unauthorized device to be displayed if it is accompanied by a conspicuous notice that it has not been authorized by the FCC and may not be offered for sale. The FCC's authority to impose monetary forfeiture penalties for violations of the Communications Act and the FCC's rules is contained in Section 503(b) of the Communications Act. 47 U.S.C. Section 503(b).

III. DISCUSSION AND CONCLUSION

5. AVI states several reasons why it should not be subject to a monetary forfeiture penalty. AVI first explains that "[T]his non-FCC-certified unit had a label on the back stating that it was not FCC-certified, and that it was not for sale." The FCC inspector, however, did not observe a label of this nature on the computer. Even if this label were on the back of the computer, it would not comply with Section 2.803 of the FCC's rules which requires a "conspicuous notice" that the computer had not been authorized by the FCC. Usually the required information is provided by a prominent sign in the immediate vicinity of the unauthorized computer.

6. AVI further explains that it placed the notice that the computer had not been authorized by the FCC on the back of the computer because "we are complying with rules which agents of the FCC told us to follow." However, AVI did not provide evidence of guidance from the FCC such as a letter from the FCC's staff. If AVI received FCC guidance, it may have misunderstood it. For example, the label required by the FCC reflecting that a radio frequency device has been authorized by the FCC is sometimes placed on the back of the device. 47 C.F.R. Section 2.925. This is an entirely different requirement than the "conspicuous notice" requirement if a device has not been authorized. 47 C.F.R. Section 2.803. Also, at electronic trade shows there are usually representatives of firms that provide testing services to obtain FCC authorizations, and AVI may have been relying on the advice of one of these representatives. However, bad advice from a third party, a failure to become acquainted with the FCC's rules, or a misunderstanding of the rules does not excuse a violation. See, e.g., Triad Broadcasting Company, Inc., 96 FCC 2d 1235, 1242 (1984).

7. AVI states, moreover, it "immediately modified -- procedures to comply with" FCC rules, and that the computer received FCC authorization "one week after the Spring Comdex 1992 incident." Remedial action to correct a violation, however, does not nullify a forfeiture penalty. Station KGVL, Inc., 42 FCC 2d 258, 259 (1973); Executive Broadcasting Corp., 3 FCC 2d 699, 700 (1966). Furthermore, although the

computer was authorized by the FCC about 10 days after the violation, the authorization was issued to ASE Technologies in Taiwan and not to AVI. AVI was marketing the computer under its own name. If there is a change in the name or identification of a device that has been authorized by the FCC, the device may not be marketed until the FCC has authorized the device under the new name. 47 C.F.R. Sections 2.929 and 2.933.

8. Finally, AVI claims that it was not marketing the computer because it was merely "showing the product" at the trade show and "[w]e had no product to ship until June." Section 2.803 of the FCC's rules prohibits not only the selling of an unauthorized device, but the offering to sell, displaying and advertising of these devices. AVI was displaying the computer at the trade show and was distributing advertising literature. Both actions constitute a violation of Section 2.803.

IV. ORDERING CLAUSES

9. **IT IS ORDERED** that pursuant to Section 5(c)(5) of the Communications Act of 1934 and Section 1.115(g) of the FCC's rules, the relief sought in the Application for Review filed by AVI is DENIED. 47 U.S.C. Section 155(c)(5), 47 C.F.R. Section 1.115(g).

10. **IT IS FURTHER ORDERED** that AVI pay the $5,600 monetary forfeiture penalty within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 215CG0005 should be placed on the check. The forfeiture payment should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If the $5,600 monetary forfeiture penalty is not paid within 30 days, the forfeiture case may be referred to the U.S. Attorney for collection through a civil suit. 47 U.S.C. Section 504(a).

11. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent certified mail, return receipt requested, to AVI Systems, Inc., 1250 45th Street, Building A, Emeryville, CA 94608-2907, Attention: Mr. Joseph Shamash, President.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-474
Washington, D.C. 20554

In the Matter of)
)
Ford Motor Company)

ORDER

Adopted: October 15, 1993 ; Released: October 28, 1993

By the Commission:

1. On June 23, 1993, Ford Motor Company (Ford) voluntarily disclosed to the Commission certain details about Ford's marketing of superregenerative receivers contained within remote keyless entry systems, installed in certain automobiles manufactured by Ford. On July 7, 1993, Ford filed applications for certification of three such receivers. Thereafter, the Commission began an informal investigation of the circumstances surrounding the receivers' marketing prior to certification.

2. The Commission and Ford have reached an agreement which would terminate the Commission's investigation. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference. In this regard, we conclude that, based on the facts before us, even if the allegations were true, we find no substantial and material questions of fact regarding Ford's basic qualifications to be a licensee. The Consent Decree does not affect the potential relevance of these facts to Ford's renewal expectancy regarding any licenses Ford holds or may hold.

4. Accordingly, IT IS ORDERED that the Consent Decree attached to this Order IS ADOPTED, and that the Secretary shall sign such Consent Decree on behalf of the Commission.

5. IT IS FURTHER ORDERED that the Commission's informal investigation is terminated.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Consent Decree

1. The Federal Communications Commission ("FCC" or "Commission") and Ford Motor Company ("Ford") hereby enter into a Consent Decree terminating an FCC investigation concerning Ford's marketing of superregenerative receivers contained within remote keyless entry systems, installed in certain automobiles manufactured by Ford prior to certification by the Commission.

2. On June 23, 1993, Ford voluntarily disclosed to the FCC certain details about Ford's aforementioned marketing of four receivers. On July 7, 1993, Ford also filed applications for certification of three such receivers. Thereafter, the Commission began its own informal investigation of the circumstances surrounding the receivers.

3. For purposes of this Consent Decree, the following definitions apply:

(a) "Office of Engineering and Technology (OET)" means the Office of Engineering and Technology of the Federal Communications Commission;

(b) "Ford Motor Company (Ford)" means that corporation or successor;

(c) "Remote keyless entry device" means one of several models of superregenerative devices that emit radiofrequency (RF) radiation and are installed in Ford vehicles to permit keyless entry into such vehicles;

(d) "Effective date of this Consent Decree" is the date on which the Order adopting this Consent Decree is released by the Commission.

4. Ford admits the jurisdiction of the Commission over it and over the subject matter of this action for the purposes of this Consent Decree and any final Order.

5. Ford waives any rights it may have to seek judicial review, appeal or otherwise challenge or contest the validity of any Order adopting this Decree. Ford agrees that upon signing by Ford and the Commission, the provisions of this Decree shall be incorporated by reference in the Order formally adopting this Decree.

6. In connection with the termination by the Commission of any investigation in accordance with the terms of this Consent Decree, in recognition of the costs incurred by the Commission in its investigation and the importance of Commission enforcement of Parts 2 and 15 of its Rules, and without admitting any alleged violations of the Commission's policies or rules as might be contained within the records of the pending investigation, or admitting any other violations of law, rule or policy, Ford agrees to the following terms, conditions and procedures that the parties believe will facilitate a fair and expeditious resolution of the above-captioned proceeding in a manner that would serve the public interest.

(a) With regard to the devices at issue, Ford agrees to maintain in force written procedures governing its activities that are designed to better

assure compliance with applicable policies and rules of the Commission, which procedures may be modified from time to time, consistent with good management practices to reflect, among other things, changes in those policies or rules, changes in Ford's organization, and practical experience. Copies of the written procedures shall be maintained by Ford and made available upon request for inspection by the Commission or OET.

(b) Ford agrees that should it receive complaints of interference involving remote keyless entry devices marketed prior to the effective date of this Consent Decree, Ford will take action to eliminate such interference. Ford further agrees that, should the Commission receive complaints of a pattern of identical interference complaints demonstrably caused by the remote keyless entry devices marketed prior to the effective date of the Consent Decree, Ford, upon notice by the Commission, will repair or retrofit all similar such units that would likely cause similar interference.

(c) Ford agrees to make a voluntary contribution to the United States Treasury, without further protest, or recourse to a trial de novo, in the amount of $210,000.00 within 15 days of the effective date of this Consent Decree. Payment may be made by mailing a check or similar instrument, made payable to the Federal Communications Commission, to Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7483.

7. In light of the covenants and representations contained in paragraph 1-6, supra, and in express reliance thereon, and in order to conserve Commission resources and avoid litigation costs, the Commission agrees that this document shall serve to resolve all issues relating to said investigation of Ford and that the investigation will hereby be terminated. In addition, in the absence of additional facts, the Commission agrees that the allegations and other circumstances involved in this proceeding will not be used against Ford with respect to its basic qualifications to be a licensee in any current or future proceeding. Moreover, in the absence of additional facts, the Commission will not, on its own motion, institute new proceedings of any kind arising out of conduct on which the investigation was based or for conduct associated with any potential infractions identified in paragraphs 1 or 2 prior to the effective date of this Consent Decree. Further, the Commission represents that it has not recommended, and further agrees, in the absence of additional facts, that it has no present intent to recommend, to any other agency of the United States with authority to enforce civil or criminal penalties arising from conduct set forth above, that such agency take any action against Ford. The Commission also agrees it will process Ford's pending certifications expeditiously.

8. Ford agrees that any violation of this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

9. The parties further agree that the effectiveness of this Consent Decree is expressly contingent upon termination of the pending investigation, issuance of an

order adopting the Consent Decree and Ford's compliance with the terms, conditions and procedures set forth in paragraph 6. If the Consent Decree is not signed by both parties or is otherwise rendered invalid by any court of law, it shall become null and void and shall not become part of the record in any investigative proceedings nor may it be used in any fashion by any party in a legal proceeding.

10. If the Commission brings an action in United States District Court to enforce the terms of this Consent Decree, Ford agrees that it will not contest the validity of the Consent Decree, will waive its statutory right to a trial de novo and will consent to a judgment incorporating the terms of this Consent Decree.

FEDERAL COMMUNICATIONS COMMISSION

By: William F. Caton
William F. Caton, Acting Secretary

FORD MOTOR COMPANY

By:
Thomas J. Dezure, Assistant Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-475
Washington, D.C.

In the Matter of Warren Ache	)	
	)	**File Nos.**
Application for Review and Request	)	90-CM-P-83
For Reinstatement of Conditional License,	)	57757-CM-R-91
Renewal of License, Assignment of License	)	56864-CM-P-91
and Modification of Conditional License	)	51603-CM-AL-91
for Multichannel Multipoint Distribution	)	
Service Station WLK285 on the F-group	)	
channels at Sioux Falls, South Dakota	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 1993; Released: October 25, 1993

By the Commission:

I. INTRODUCTION

1. Before the Commission is an Application for Review filed by Warren Ache (Ache) challenging the finding by the Domestic Facilities Division (Division) that his Multichannel Multipoint Distribution Service (MMDS) conditional license for station WLK285 had been automatically forfeited and the dismissal of the above-referenced modification, assignment, and renewal applications. Sioux Valley Rural Television, Inc. (SVRTV)[1], licensee for the F-group channels at Colman, South Dakota, filed an opposition to Ache's Application for Review.

II. BACKGROUND

2. Ache's MMDS application was selected for qualification review as the result of a Commission lottery held on July 28, 1986. Ache was granted a conditional license on December 11, 1989. The authorization expressly provided that the station be constructed by December 11, 1990 and specified the use of a 10-watt transmitter and dual antenna system. The conditional license specified that the station's transmitter must be an Electronic Missiles and Communications, model no. TTS-10G and the station's antenna must have two Andrew antennae, model nos. 62351 and 62350. The geographic coordinates specified on the face of the authorization identified transmitter site geographic coordinates of 43 deg. 31 min. 04 sec. North latitude, 96 deg. 45 min. 20 sec. West longitude. A few weeks prior to the expiration of his authorization, (November 14, 1990) Ache filed an application for additional time to construct the MMDS station. Thereafter, on December 3, 1990, Ache filed an application to modify the

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1 In addition, SVRTV also filed an application for the F-group channels at Sioux Falls, South Dakota.

construction authorization proposing to change location to a transmitter site with geographic coordinates 43 deg. 28 min. 30 sec. North latitude, 96 deg. 45 min. 28 sec. West longitude. In addition, the modification application proposed a change in transmitter equipment to a Comwave transmitter, model no. SB010A, and to an Andrew antenna, model no. HMD12VC. Two days later, on December 5, 1990, Ache filed an application to assign his conditional license to Family Entertainment Network (FEN). Subsequently, on December 11, 1990, Ache filed a Certification of Completion of Construction (FCC Form 494A), certifying that the station had been constructed, as authorized and was fully operational as of December 10, 1990. On February 22, 1991, Ache and FEN asked that the Commission declare the construction extension application moot, inasmuch as the station had been constructed by the construction deadline. On March 6, 1991, Ache filed an application for renewal of his station license.

3. In April and May, 1991, SVRTV filed Petitions to Deny Ache's assignment, renewal, and modification applications. SVRTV alleged that Ache's authorization should be deemed forfeited because the station had not been constructed as authorized in that the transmitter, antenna system, and geographic coordinates differed from those indicated on the authorization. SVRTV also claimed that the station had failed to provide service. Further, SVRTV contended that the actions of both Ache and FEN indicated that FEN was prematurely exercising control over Ache's station. Ache filed oppositions to each petition.

4. While the Petitions to Deny were pending, various MDS and MMDS applicants and licensees for Sioux Falls and Colman, including Ache, SVRTV, and FEN, entered into a "Settlement Agreement" whereby all parties agreed to resolve all pending disputes, including SVRTV's petitions to deny against Ache.[2] In addition, the Agreement proposed that SVRTV would operate the wireless cable system at Colman, and FEN would operate the wireless cable system at Sioux Falls. The terms of the "Settlement Agreement" were subject to Commission approval.

5. Because of the serious nature of the allegations raised by SVRTV against Ache prior to the filing of the purported "settlement

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2 By agreement dated July 16, 1992, Lincoln Union Electric Company, Northern Electric Cooperative, Inc., Big Sioux Rural Water System, Inc., Kevin Johnson, and Boyd Hopkins joined the above parties in the "Settlement Agreement." The "Settlement Agreement" specifically stated that all conditions outlined in the agreement were contingent upon Commission assent, which the parties agreed should occur within ninety (90) days of the filing of the agreement. The agreement also provided that in the event of a failure of any condition, the agreement would be declared null and void in its entirety.

agreement", the Division did not grant SVRTV's request in the "Settlement Agreement" to withdraw its Petitions to Deny. Based upon the evidence presented by SVRTV and Ache's response thereto, the Division, by decision dated December 11, 1992, found that Ache had failed to construct station WLK285 as authorized, pursuant to Section 21.43(b). In addition, the Division determined that Ache had made major modifications to the station on two occasions without serving a copy of the modification application, FCC Form 494, on appropriate parties as defined by Section 21.902 and without filing a completed FCC Form 494 with the Commission, pursuant to Section 21.42(b). Also, based upon the observations by SVRTV engineers and the 1991 annual report filed by Ache which stated that there were zero hours of entertainment, education and training, public service, and data transmission service rendered in 1991, the Division found that Ache had failed to render service to the public during 1991, contrary to the requirements of Section 21.303(d). Further, because Ache had made modifications to the station in April 1991 to change the transmitters and antenna, without obtaining prior authorization from the Commission, the Division found that Ache had voluntarily discontinued service, contrary to the requirements of Section 21.303(b). Finally, the Division determined that FEN, the proposed assignee, had prematurely exercised control over Ache's station. The Division concluded that these rule violations resulted in the forfeiture and termination of the station authorization.

6. Ache filed an Application for Review contending that the Division erred in finding that:

(a) SVRTV had standing to file Petitions to Deny against Ache;
(b) Ache's conditional license should be deemed forfeited for failure to construct station WLK285 in strict accordance with his authorization;
(c) the changes to the station were not permissive modifications;
(d) FEN exercised premature control over the station; and
(e) Ache's license should be submitted for cancellation.

The issue for consideration here is whether the Division's findings of fact or conclusions of law were in error. For the reasons discussed below, we affirm the Division's findings.

III. DISCUSSION

7. Standing. Ache argues that the Division erroneously found that SVRTV had standing. The petitions filed by SVRTV contained specific allegations of fact, supported by affidavit by persons with personal knowledge, demonstrating that SVRTV was a party-in-interest, as required by Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(1), and Section 21.30

of the Commission's Rules. A party seeking to establish standing to file a petition to deny must demonstrate not only a direct or threatened "distinct and palpable injury", but also a causal link "between the claimed injury and the challenged action." The causal link must be demonstrated by establishing: (1) that the injury can be traced to the challenged action; and (2) that the injury would be prevented or redressed by the relief requested. Lawrence N. Brandt, 3 FCC Rcd 4082 (1988); see also Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978). SVRTV maintains that it suffered a direct injury in that its members, who reside in Sioux Falls, were harmed by Ache's failure to provide MMDS service. The requested relief, declaration that Ache's license be forfeited, would remedy the injury by allowing another MMDS licensee to provide service to Sioux Falls. Ache advances the argument that this reasoning is far too speculative to establish the direct causal link required to show forfeiture will redress the alleged injury.[3] We disagree with Ache. We find that the injury was sufficiently identified by SVRTV and further injury to the members of the cooperative residing in Sioux Falls would be prevented by forfeiture. Moreover, SVRTV filed an application for the F-group channels based upon its contention that Ache had forfeited his license for these channels. Consequently, we believe that SVRTV satisfied the statutory threshold requirement of Section 309(d)(1) of the Communications Act and the burden for establishing standing as stated in Brandt and Duke Power. Therefore, the Division correctly concluded that SVRTV had standing to file its Petition to Deny in that it demonstrated the requisite interest and injury.

8. Certification of Completion of Construction. Section 21.43(b) states:

> Each license for a radio station for the service in this part shall also specify as a condition therein that upon the completion of construction, each licensee must file with the Commission a certification of completion of construction using FCC form 494A, certifying that the facilities as authorized have been completed and that the station is now operational and ready to provide service

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3 While Ache maintains that no causal link was established, he argues that forfeiture of the license leads only to further delays because the Commission must process new applications. To avoid such delay, Ache contends any alleged injury to SVRTV's members would have been redressed by grant of the assignment and modification applications, not by forfeiture of the license. However, the alternative presented by Ache must be rejected because Ache failed to provide service to the public as authorized and as required by the rules. SVRTV, or another applicant, will ultimately be authorized to construct and operate an MMDS station to provide service to Sioux Falls.

> to the public, and will remain operational during the license period, unless the license is submitted for cancellation.

(emphasis added.) Ache certified in his FCC Form 494A that MDS station WLK285 was constructed as authorized. Ache's authorization specified the use of an Electronics Missiles and Communications, model nos. TTS-10G transmitter, two Andrew antennas, model nos. 62351 and 62350, and construction of the transmitter site at geographic coordinates 43 deg. 31 min. 04 sec. North latitude, 96 deg. 45 min. 20 sec. West longitude. However, Ache admits that the station was not constructed consistent with the specifications contained in his authorization. Rather, the station was constructed at the geographic coordinates of 43 deg. 30 min. 22 sec. North latitude, 96 deg. 46 min. 13 sec. West longitude (approximately 1.09 miles from the authorized site) with a Comwave, model no. SBM1-8 transmitter and one Andrew, model no. HMD12HC antenna. Ache concedes that "his error, if any, was in certifying that the station was constructed as authorized."[4] But, he argues that the filing of the incorrect certification was entirely unintentional.[5] By his own admission, Ache failed to construct the station consistent with his authorization and presents no persuasive justification to reverse the Division's findings in this regard.

9. Further, Ache argues that neither Section 21.44(a)(1) nor Section 21.42 of the Commission's Rules contemplates forfeiture where a station is timely constructed and a certification of completion of construction is timely filed. Ache's sole reliance on the timely filing of the certification of construction ignores the issue that the construction occurred inconsistent with the authorization and the certification filed was inconsistent with the construction authorization.[6] The timely filing of an incorrect certification does not render the certification any less incorrect. See Section 21.43(b). On the face of each conditional license (FCC Form 462-B), is a description of the authorization's conditions and

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4 Ache Application for Review at 10.

5 Ache, without support, argues that forfeiture of license is the appropriate sanction only where a licensee has intentionally falsely certified the status of construction. Section 21.44(a)(1) is not limited to situations of intentional violation.

6 An applicant takes a construction authorization subject to compliance with the terms and conditions of authorization set forth in rule sections 21.43 and 21.44(a)(1). Acceptance of the construction authorization constitutes accession to these conditions. Miami MDS Company and Boston MDS Company, 7 FCC Rcd 4347, 4349 (1992); cf. P R Temmer v FCC, 743 F.2d 918 (D.C. Cir. 1984); Music Broadcasting Co. v FCC, 217 F.2d 339 (D.C. Cir. 1954).

requirements which, in part, states

> "Upon completion of construction of the station in accordance with the terms of the license, the licensee shall demonstrate to the satisfaction of the Commission that all terms, conditions, and obligations set forth in the application and in the license have been fully met, as evidenced by the timely filing of a certification of completion of construction with the Commission certifying that the facilities as authorized have been completed and that the station is now operational and service to the public is ready to be commenced."

(Emphasis added.)

10. Ache had full knowledge of the conditions of his authorization and the consequences of failing to satisfy those conditions. The terms and conditions of the authorization were not met; therefore, the timely filing of the certification of completion of construction is not dispositive. Ache's failure to construct the station as authorized and failure to file a certification of completion of construction consistent with his authorization before the expiration of the construction period specified on the authorization triggered the automatic forfeiture of Ache's license. Section 21.44(a)(1), as well as the "Authorization Conditions and Requirements Form" (FCC Form 462-B) provides: "A license shall be automatically forfeited without further notice to the licensee upon ... [t]he expiration of the construction period specified therein ... unless ... certification of construction is filed with the Commission pursuant to Section 21.43." Ache did not satisfy this requirement because the filing he made did not satisfy Section 21.43(b), which required the construction of the facilities "as authorized." Therefore, we find that the Division properly concluded that Ache's license had been automatically forfeited for failure to comply with the express conditions of his conditional license and with Section 21.43(b).[7] In light of our affirmance of the Bureau on this point, we need not address Ache's other contentions.

IV. CONCLUSION

11. Based on the facts and circumstances before us, we find that

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7 Ache states that the Commission should not have imposed the "draconian sanction of a forfeiture" of his license, but should have fashioned a penalty similar to the monetary forfeiture imposed in Delray Cellular Associates, 4 FCC Rcd 2233 (Mob. Serv. Div. 1989). Ache's reliance on Delray is misplaced. The staff's interpretation of Section 22.43(a)(3) of our Rules does not control our interpretation here of Section 21.44. Here, by operation of Section 21.44, Ache's license was automatically forfeited.

the Division properly held that Ache's authorization was forfeited for his failure to construct the MMDS station as authorized.[8] While Section 21.44 provides that a license may be reinstated if the Commission determines that reinstatement would best serve the public interest, based on the totality of the facts in this case, we find that reinstatement is not justified. Accordingly, the Application for Review filed by Warren Ache **IS HEREBY DENIED.** This order is issued pursuant to 47 C.F.R. Sec. 1.115, and is effective on its release date. See 47 C.F.R. Secs. 1.4(b) and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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8 Ache also filed a request to stay the further processing of the application of Sioux Valley Rural Television, Inc. for the F-group channels at Sioux Falls, South Dakota pending consideration of his Application for Review. In light of our decision herein, Ache's request for stay is hereby rendered moot.

By letter dated, August 26, 1993, Ache's renewal application (File No. 57757-CM-P-91) was dismissed as moot. Based upon the foregoing, Ache's request to reconsider the dismissal of his renewal application is also denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 93-476
Washington, D.C.

In the Matter of the Application of	)	
	)	
KEVIN JOHNSON	)	**FILE NO. 50076-CM-P-88**
	)	
For Authority to Construct	)	
and Operate a Multichannel	)	
Multipoint Distribution Service	)	
Station on the E-group channels	)	
at Colman, South Dakota	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 19, 1993; Released: October 25, 1993

By the Commission:

1. Introduction. Kevin Johnson (Johnson) filed an Application for Review challenging the dismissal by the Domestic Facilities Division (Division) on delegated authority of his application for authority to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels at Colman, South Dakota. Kevin Johnson, (letter order December 11, 1992). Sioux Valley Rural Television, Inc. (SVRTV) filed an Opposition to the Application for Review.[1]

2. Background. On December 29, 1987, Johnson filed the above-referenced application on a date not designated by the Commission for filing MMDS applications, pursuant to 47 C.F.R. Sec. 21.901(d)(4).[2] Because Johnson filed his application after September 9, 1983, he filed a request for waiver of Section 21.901(d)(4). In addition, Johnson filed a request for waiver of 21.901(d)(5) because his proposed transmitter site was within fifteen (15) miles of the Sioux Falls, South Dakota Metropolitan

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1 SVRTV is the F-group channel licensee at Colman, South Dakota.

2 At the time Johnson's application was filed, the Commission authorized the filing of MMDS applications on one filing date, September 9, 1983. See MMDS Allocation Order, 94 FCC 2d 1203 (1983). Thereafter, in accordance with Section 21.901(d)(4), on April 20, 1988, the Commission again permitted the filing of applications for the MMDS E-group and F-group frequencies for any location farther than 50 miles from any authorized or previously-proposed facility and farther than 15 miles from the boundary of a statistical area for which there were MMDS applications pending on April 19, 1988. See Common Carrier Bureau Opens Filing Period For Multichannel Multipoint Distribution Service Applications, 3 FCC Rcd 2661 (1988).

Statistical Area. Pursuant to Sections 21.901(d)(7) and 21.902(a), Johnson's application also included an interference analysis of adjacent-channel ITFS station Minnesota Tele-Media. One month after the filing of his MMDS application, on January 25, 1988, Johnson filed an additional interference analysis, citing two previously-proposed or authorized cochannel MMDS facilities within 50 miles of his proposed facility: (1) the proposed cochannel station of Multichannel Distribution of America (MDA) at Brookings, South Dakota and (2) Edna Cornaggia's authorized cochannel station, WLK281, at Sioux Falls, South Dakota. Johnson's analyses claimed that his station would not cause interference to either the MDA or Cornaggia facilities. Also, pursuant to Section 21.902(c)(2), Johnson filed an interference analysis for the previously-proposed adjacent channel stations of Warren Ache at Sioux Falls and Robert Spotts at Toronto, South Dakota.

3. The Division granted Johnson's requests for waiver of Sections 21.901(d)(4) and 21.901(d)(5). In addition, the Division determined that Johnson had made an adequate demonstration that his proposed station would not cause harmful interference to the previously-proposed adjacent channel stations of Ache's F-group station at Sioux Falls or Spotts's F-group station at Toronto. The Division was not able to conduct a meaningful interference study of the proposed station at Brookings because MDA's application was technically deficient and relevant information was not filed. However, pursuant to Section 21.902(c)(1), the Division found that Johnson's proposed station design failed to provide at least 45 dB of cochannel interference protection within Cornaggia's protected service area of Sioux Falls. The Division concluded therefore that Johnson's interference analysis regarding Cornaggia's authorized cochannel station WLK281 at Sioux Falls was defective in that it failed to reveal that there would be a potential for harmful interference. In addition, the Division found that at the time Johnson filed his application, he failed to submit a specific technical interference showing specifying the techniques he would employ to avoid interference to cochannel and adjacent channel stations. See Amendment of Part 2, 21, 74 and 94 of the Commission's Rules and Regulations with regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, 94 FCC 2d 1203 (1983); see also Section 21.901(d)(7). Based on Johnson's failure to comply with Sections 21.902(c)(1) and 21.901(d)(7) of the Commission's Rules, the Division dismissed Johnson's MMDS application for the E-group channels at Colman, South Dakota. Johnson, (letter order December 11, 1992).

4. Pleadings. Within thirty (30) days of this dismissal, Johnson filed an Application for Review. Johnson argues that he made an adequate demonstration that his proposed station would not cause harmful interference to Cornaggia's cochannel station WLK281 at Sioux Falls. Further, Johnson argues that as Cornaggia's station

authorization has been forfeited, he is not required to demonstrate interference protection.[3] In addition, Johnson argues that he did indeed comply with Sections 21.901(d)(7) and 21.902(a) by demonstrating the specific techniques to be employed to avoid harmful interference to cochannel and adjacent channel stations.[4] In its opposition, SVRTV argues that Johnson failed to meet its burden of proof and demonstrate that the Division's decision was unsupported by applicable rules or by the facts.

5. Discussion. Johnson's application for review is hereby dismissed for failure to comply with the requirements of 47 C.F.R. Sec. 1.115(c), which provides: "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Johnson presented questions of law and fact which the Division, as the designated authority that acted on the application, has not been afforded an opportunity to consider.[5] The proper procedure, pursuant to 47 C.F.R. Sec. 1.106, would have been for Johnson to file a petition for reconsideration of the Division's determination. See 47 C.F.R. Sec. 1.106. Therefore, Johnson's application for review is dismissed as procedurally defective.[6] See Philadelphia MDS Company, 8 FCC Rcd 3147 (1993); see also Sherry Rullman, 8 FCC Rcd 4012 (1993).

6. Conclusion. Accordingly, IT IS ORDERED that the application for

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3 Cornaggia's conditional license for station WLK281 was forfeited December 12, 1988. Cornaggia's license was still pending at the time Johnson filed his application.

4 Johnson argues that he demonstrated his continuing commitment to ensure non-interference in a "Settlement Agreement" filed with the Commission on July 20, 1992. The "Settlement Agreement" specifically stated that the Commission had to accept all terms of the agreement within ninety (90) days of its filing. As the Commission did not approve all provisions, by operation of the express terms of the agreement, the agreement became null and void.

5 These questions are: (1) whether Johnson was required to demonstrate non-interference to Cornaggia's station WLK281, which was forfeited subsequent to Johnson's filing of his MMDS application, pursuant to Section 21.902(c); (2) whether the Division would have granted a waiver of the interference protection standards of Section 21.902.

6 Because we dispose of Johnson's Application for Review on procedural grounds, we need not reach the merits of arguments raised.

review filed by Kevin Johnson IS DISMISSED due to his failure to comply with the requirements of 47 C.F.R. § 1.115(c). This order is issued pursuant to 47 C.F.R. § 1.115, and is effective on its release date. See 47 C.F.R. §§ 1.4(b) and 1.115.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policies and Rules Implementing	)	CC Docket No. 93-22
the Telephone Disclosure and Dispute	)	RM-7990
Resolution Act	)	

ORDER

Adopted: October 29, 1993 Released: October 29, 1993

By the Commission:

1. On July 15, 1993, the Commission adopted a Report and Order in CC Docket No. 93-22[1] amending rules governing the provision of interstate pay-per-call services to comport with the requirements of the Telephone Disclosure and Dispute Resolution Act (TDDRA).[2] The TDDRA mandated specific provisions pertaining to billing and collection of pay-per-call services that we incorporated in Section 64.1510 of our rules.[3] Section 64.1510 is scheduled to take effect on November 1, 1993. Several petitions for reconsideration of the Report and Order are pending before us.

2. Thirteen parties have requested or supported waiver of the November 1 effective date with respect to certain provisions in Section 64.1510.[4] The

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1 Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, CC Docket No. 93-22, Report and Order, FCC 93-349 (released Aug. 13, 1993); petitions for recon. pending.

2 Public Law 102-556, 106 Stat. 4181, approved Oct. 28, 1992.

3 47 C.F.R. § 64.1510.

4 See AllTel Service Corporation Comments in Support of AT&T's Petition for Limited Interim Waiver on an Expedited Basis (Oct. 27, 1993); American Telephone and Telegraph Company (AT&T) Petition for Limited Interim Waiver on an Expedited Basis (Oct. 20, 1993); Cincinnati Bell Telephone (CBT) Petition for Temporary Limited Waiver (Oct. 20, 1993); GTE Service Corporation's Comments in Support of AT&T (Oct. 22, 1993); MCI Telecommunications Corporation Petition for Limited Waiver (Oct. 26, 1993); National Telephone Cooperative Association Comments in Support of AT&T's Petition for Limited Waiver (Oct. 27, 1993); New England Telephone and Telegraph Company Petition for Limited Waiver (Oct. 25, 1993); North State Telephone Company Petition for Limited Waiver (Oct. 27, 1993); Quintex

provisions at issue require any common carrier assigning a telephone number to a pay-per-call service and performing billing and collection for that service to: (1) issue billing statements that show all pay-per-call and related charges separately from ordinary local or long distance charges; and (2) include in any bill containing pay-per-call charges a brief statement outlining certain specified consumer rights and responsibilities with respect to use of pay-per-call services. Although the obligation to comply with the billing requirements prescribed by Section 64.1510(a) is imposed on interexchange carriers (IXCs), local exchange carriers (LECs) must be fully capable of accomplishing pay-per-call billing in the required fashion since IXCs typically employ LECs as subcontractors to perform billing and collection services. The requests for waiver of the effective date of the specified billing provisions range from less than one month to over nine.[5]

3. For the reasons set forth below, we are, on our own motion, reconsidering the effective date of the "separate billing" requirements in Section 64.1510(a)(2)(ii) and (b) and extending that date from November 1, 1993 to January 1, 1994. However, we are not extending the deadline for the billing disclosure requirement encompassed by Section 64.1510(a)(2)(i). We note that no party has explained why carriers are unable to produce billing forms or inserts containing the specified billing disclosure statement. In fact, one petitioner has noted that although new billing forms are not yet ready for use, compliance with Section 64.1510(a)(2)(i) can be accomplished by including a separate notice with all bills regardless of whether pay-per-call charges are assessed.[6] In our Notice of Proposed Rule Making and Notice of Inquiry in this proceeding[7] we asked whether billing disclosure requirements would enhance consumer awareness without unduly burdening the carriers. No responding party, including petitioners, suggested that disclosures of the type covered by our rule would be especially onerous.

4. Petitioners have averred that substantial modifications to billing systems must be designed and tested before compliance with the separate billing

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Data Systems, Corp. Comments in Support of AT&T's Petition for a Temporary Limited Waiver (Oct. 27, 1993); Sprint Corporation Petition for Limited Waiver (Oct. 27, 1993); United States Telephone Association Comments on Petitions for Waiver and Petition for Limited Extension of Compliance Dates to Match Any Extension Granted to Interexchange Carriers (Oct. 25, 1993); U S West Petition for Reconsideration (Sep. 24, 1993). In addition, on October 27, 1993, the Information Industry Association filed a letter supporting the carriers' requests.

5 It appears that nine months may no longer be required. See letter from D. V. Golden, AT&T to Secretary, FCC (Oct. 27, 1993) outlining certain implementation dates for major carriers.

6 See CBT Petition for Temporary Limited Waiver.

7 Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, CC Docket No. 93-22, Notice of Proposed Rule Making and Notice of Inquiry, 8 FCC Rcd 2331 (1993) (NPRM/NOI).

requirement can be assured, suggesting that the full range of necessary changes could not be anticipated until after release of final pay-per-call regulations in August 1993. AT&T has outlined the options available to IXCs carrying pay-per-call services, and the attendant consequences, if the carriers are unable to meet the November 1, 1993 deadline. If neither an IXC nor some or all of its subcontracting LECs can meet the pay-per-call billing requirements, the IXC would be compelled to choose one of two actions to avoid violating Section 64.1510: (1) cease transmitting pay-per-call services, either entirely or, to the extent possible, selectively for those particular regions where billing cannot be accomplished as required; or (2) continue transmission of pay-per-call services but defer billing until compliance is assured. Either option could threaten the financial stability and, quite possibly, even the survival of some information providers, since revenue would be either deferred or completely lost. In addition, consumers would not be well served if familiar pay-per-call programs are no longer available or if bills are not rendered until significantly after the services were used.

5. Balanced against the disruption and confusion likely to ensue if the November 1, 1993 effective date is not extended are the consumer interests in full implementation of protective measures that Congress and this Commission have deemed necessary to ensure that telephone subscribers are able to understand and assert their rights with respect to pay-per-call services. Although we are concerned that the consumer benefits anticipated from pay-per-call billing separation requirements not be unduly delayed, we do not believe that a 60 day extension will substantially harm consumers, given other pay-per-call requirements intended to promote consumer awareness. For example, IXCs carrying pay-per-call services must, by November 23, 1993, provide all their subscribers with a separate statement explaining consumer rights and obligations with respect to the use of interstate pay-per-call services.[8] This is an annual disclosure obligation separate from the monthly billing disclosure requirement. Further, Section 64.1510(a)(2)(iv) requires that telephone bills containing pay-per-call charges include the telephone number for the IXC's toll free pay-per-call information line. These separate disclosure requirements should ensure that consumers have an opportunity during the separate billing implementation period to learn about their pay-per-call rights and to obtain any information they need to pursue a dispute involving pay-per-call charges.

6. Nonetheless, we cannot justify a lengthy extension beyond the original November 1, 1993 deadline. First, there is no convincing evidence that the billing system changes necessary to segregate pay-per-call charges from those for ordinary long distance services are so massive or complicated that they could not be implemented in the near future. In fact, some carriers apparently are able to meet the November 1 date. Second, the billing separation requirement was specifically mandated by the TDDRA. Inclusion of that requirement thus indicates a Congressional judgment that this measure is necessary to fully protect consumer interests. While some parties correctly note that the November

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8 See 47 C.F.R. § 64.1509(b)(2). AT&T has asked for an extension or limited interim waiver of the November 23, 1993 deadline applicable to this requirement. We deny this request. The requirement that consumers be given this notice in November is statutory. See 47 U.S.C. § 228(d)(3).

1, 1993 effective date is not a statutory requirement, we cannot assume that a lengthy extension would either serve the public interest or be consistent with Congressional intent. The TDDRA required that implementing rules be adopted within 270 days of the statute's enactment. The additional eight or nine months sought by several parties would mean that the statutory mandate for separation of pay-per-call charges would not take effect until over one year after the deadline for adoption of the rule. We cannot identify any reasonable justification for such a delay especially since all parties have been aware, at least since the statute was enacted in October 1992, that separation would be required. Moreover, no party filing comments in this proceeding indicated that implementation of the separation requirement proposed in the NPRM/NOI and adopted verbatim in the Report and Order would require such a lengthy implementation period.

7. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that effectuation of Sections 64.1510(a)(2)(ii), (b) is extended from November 1, 1993 until January 1, 1994.

8. IT IS FURTHER ORDERED, that, because of the action taken herein on our own motion, the Petitions filed by the parties identified in footnote 4 are DISMISSED.

9. IT IS FURTHER ORDERED, pursuant to Section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Order is EFFECTIVE UPON RELEASE.[9]

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

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9 Because the rule change we have adopted herein relieves a restriction, the normal 30 day notice period is not required. 5 U.S.C. § 553(d)(1). In any event, because of the emergency nature of our action, there is good cause for immediate effectuation. See 5 U.S.C. § 553(d)(3).

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 93-492

In the Matter of	)	
	)	
Simplification of the	)	CC Docket No. 92-296
Depreciation Prescription	)	
Process	)	

ORDER INVITING COMMENTS

Adopted: November 8, 1993 ; **Released:** November 12, 1993

Comment Date: December 17, 1993

Reply Comment Date: January 21, 1994

By the Commission:

I. INTRODUCTION

1. On September 23, 1993, this Commission adopted streamlined depreciation prescription procedures for American Telephone and Telegraph Company (AT&T) and those local exchange carriers (LECs) regulated under the Commission's price cap incentive regulatory model (price cap LECs).[1] The streamlining approach we selected for the price cap LECs requires us to establish ranges of projection life and future net salvage factors for as many plant accounts as feasible, beginning in 1994.[2] By this Order, we invite comment on the selected accounts and the proposed projection life and future net salvage ranges set forth in the Appendix.

II. BACKGROUND

2. Prior to adoption of the Depreciation Simplification Order, the depreciation prescription process required carriers to submit extensive data to support their future net salvage, projection life, and survivor curve estimates (basic factors) underlying proposed depreciation rates.[3] These data requirements often resulted in voluminous submissions, numbering 20-25 pages of analyses for each plant account. In recognition of the regulatory, technological, and market changes that price cap LECs face today, we concluded that the process could and

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[1] Simplification of the Depreciation Prescription Process, Report and Order, CC Docket 92-296, FCC 93-452 (adopted September 23, 1993) (Depreciation Simplification Order).

[2] We set forth in the Depreciation Simplification Order the streamlined filing requirements for AT&T. Id. at para. 93.

[3] See Simplification of the Depreciation Prescription Process, Notice of Proposed Rulemaking, 8 FCC Rcd 146, at para. 147 (1993).

should be simplified. Thus, we determined that ranges could be established for the future net salvage and projection life estimates.[4] Under our new process, if a carrier meeting the requisite criteria[5] proposes to use future net salvage and projection life estimates from within established ranges, it will not need to submit the detailed supporting data now required.[6]

3. We determined that the new, streamlined procedures should be implemented in phases, beginning with the accounts most readily adaptable to the range approach. We now identify accounts for which we propose to establish ranges for use beginning in 1994. We solicit public comment on these proposals.

III. DISCUSSION

A. The Accounts

4. In the Depreciation Simplification Order, we concluded that ranges should be established for all plant accounts if feasible. We also expressed our desire to establish ranges for as many accounts as practicable for use in 1994. However, we acknowledged that technical problems make it difficult to establish ranges for certain accounts.[7] Given our current resources, we concluded that we would be unable to resolve these technical problems so that ranges for all accounts could be used beginning in 1994. After detailed review of current depreciation data, we tentatively conclude that the plant categories listed in the Appendix meet the range criteria established by the Depreciation Simplification Order, and thus should be selected for the use of ranges in 1994.

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[4] Depreciation Simplification Order at para. 6.

[5] Id. at paras. 72-74.

[6] We delegated to the Common Carrier Bureau the authority to determine the filing requirements, consistent with our decision, necessary for range accounts. Id. at n. 129.

[7] Id. n. 110.

5. As set forth in the Appendix, we propose to establish ranges for twenty-two plant categories.[8] We direct the Bureau to recommend ranges for the remaining accounts if feasible as soon as possible. For the most part we are proposing to establish ranges at the plant account level. For four accounts[9], however, we are proposing to establish ranges for homogeneous subdivisions of accounts, which are referred to as "rate categories."[10] For these accounts we currently prescribe rates at the rate category level when carriers so request, because it enables the carriers to simplify their analyses and it results in more accurate estimates for the accounts as a whole. We invite comment on this proposal.

6. If we implement these proposals, only those carriers seeking depreciation rates at the rate category level will be able to avail themselves of the streamlined procedures for the Circuit Equipment, Aerial Cable, Underground Cable, and Buried Cable accounts. We encourage the carriers who do not currently subdivide these accounts to do so because it will result in more accurate rates and it will enable them to take advantage of the streamlined procedures. We do not believe it will be difficult or expensive for these carriers to change to the rate category procedure because our accounting rules already require them to maintain the subsidiary records necessary to accomplish this.[11]

B. The Ranges

7. In the Depreciation Simplification Order, we set forth a number of specific data that should be considered in establishing the projection life and future net salvage ranges. These data include, but are not limited to: a range of +/- one standard deviation around an industry-wide mean of basic factors underlying currently prescribed rates; the number of carriers encompassed by this range; and any trends of LEC plant retirement and modernization plans that are not fully reflected in current basic factors.[12] However, we recognized that these specific data must be considered in light of our obligation to prescribe reasonable depreciation rates:

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[8] At this time, we are not proposing to establish ranges for the following nine complete and three partial accounts: Accounts 2121, Buildings; 2211, Analog Electronic Switching; 2212, Digital Electronic Switching; 2215, Electro-Mechanical Switching; 2220, Operator System; 2232, Digital portion of the Circuit Equipment Account; 2411, Poles; 2421, Metallic portion of Aerial Cable; 2423, Metallic portion of Buried Cable; 2425, Deep Sea Cable; 2426, Intrabuilding Cable; and 2431, Aerial Wire.

[9] The four accounts for which we propose to prescribe ranges at the rate category level are: Accounts 2232, Circuit Equipment; 2421, Aerial Cable; 2422, Underground Cable; and 2423, Buried Cable.

[10] Depreciation Simplification Order at n. 91.

[11] See, e.g., 47 C.F.R. §§32.2421(a).

[12] Depreciation Simplification Order at para. 62.

> ... we wish to make the ranges wide enough to accommodate a significant number, if not all, of the LECs. On the other hand, we must not make the ranges so wide that they would no longer enable us to exercise effective oversight of depreciation rates.[13]

Thus, in setting ranges, we considered both the specific data enumerated in the Depreciation Simplification Order and our obligation to prescribe reasonable depreciation rates. In the Appendix, we set forth our proposed projection life and future net salvage ranges for the proposed range accounts. We invite comment on the proposed ranges.

IV. PROCEDURAL MATTERS

A. Ex Parte

8. This is a non-restricted notice and comment rulemaking proceeding. Ex Parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules.[14]

B. Regulatory Flexibility

9. We certify that the Regulatory Flexibility Act of 1980 does not apply to this proceeding because if the proposals in this Order Inviting Comments are adopted, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act.[15] Because of the nature of local exchange and access service, the Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not "small entities" as defined by that act.[16] The Secretary shall send a copy of this Order Inviting Comments, including this certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of that act.[17]

V. COMMENT DATES

10. We invite comment on the proposals set forth above. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules,[18] interested parties may file comments on or before December 17, 1993, and reply comments on or before January 21, 1994. To file formally in this

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[13] Id. at para. 61.

[14] See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

[15] 5 U.S.C. §601(3).

[16] See MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983).

[17] 5 U.S.C. §603(a).

[18] 47 CFR §§ 1.415, 1.419.

proceeding, interested parties must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Interested parties should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. We also ask that parties send a courtesy copy of their comments to the Accounting and Audits Division, 2000 L Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

VI. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 220(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), and 220(b), that NOTICE IS HEREBY GIVEN of proposed plant accounts for which basic factor ranges should be established and the ranges proposed for those accounts to be used in the depreciation prescription process as described in Simplification of the Depreciation Prescription Process, CC Docket No. 92-296, FCC No. 93-452.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Appendix

PROPOSED ACCOUNTS AND RANGES FOR INITIAL IMPLEMENTATION

ACCOUNT NUMBER	ACCOUNT NAME	DEPRECIATION RATE CATEGORY	PROJECTION LIFE RANGE (YEARS)		FUTURE NET SALVAGE RANGE (PERCENT)	
			LOW	HIGH	LOW	HIGH
2112	Motor Vehicles	Motor Vehicles	7.5	9.5	10	20
2113	Aircraft	Aircraft	7	10	30	60
2114	Special Purpose Vehicles	Special Purpose Vehicles	12	18	0	10
2115	Garage Work Equipment	Garage Work Equipment	12	18	0	10
2116	Other Work Equipment	Other Work Equipment	12	18	0	10
2122	Furniture	Furniture	15	20	0	10
2123.1	Office Support Equip	Office Support Equip	10	15	0	10
2123.2	Co. Communications Equip	Co. Communications Equip	7	10	-5	10
2124	General Purpose Computers	General Purpose Computers	6	8	0	5
2231	Radio Systems	Radio Systems	9	15	-5	5
2232	Circuit Equipment	Digital Data Service	7	11	-5	10
2232	Circuit Equipment	Analog	8	11	-5	0
2311	Station Apparatus	Station Apparatus	5	8	-5	5
2341	Large PBX	Large PBX	5	8	-5	5
2351	Public Telephone	Public Telephone	7	10	0	10
2362	Other Term Equipment	Other Term Equipment	5	8	-5	5
2421	Aerial Cable	Non-Metallic	25	30	-25	-10
2422	Underground Cable	Non-Metallic	25	30	-20	-5
2422	Underground Cable	Metallic	25	30	-30	-5
2423	Buried Cable	Non-Metallic	25	30	-10	0
2424	Submarine Cable	Submarine Cable	25	30	-5	0
2441	Conduit Systems	Conduit Systems	50	60	-10	0

*U.S. Government Printing Office: 1994 — 300-842/00019